



Neutral Citation Number: [2024] EWHC 1725 (Ch)

Case No: BL-2021-000092

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**

Rolls Building  
Fetter Lane  
London, EC4A 1NL

4 July 2024

**Before :**

**MR NICHOLAS THOMPSELL**  
**sitting as a Deputy Judge of the High Court**

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**Between :**

**(1) ADVANCED MULTI-TECHNOLOGY  
FOR MEDICAL INDUSTRY**

**(2) CAMEL SALES LIMITED**

**(3) DAVID POPECK**

**Claimants**

**- and -**

**UNISERVE LIMITED**

**Defendant**

**-and -**

**MAXITRAC LIMITED**

**Third Party**

**- and -**

**ANDREW STEAD**

**Fourth Party**

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**David Lewis KC and Edward Knight** (instructed by **Trowers & Hamlins LLP**)  
for the Claimants

**David Walsh and Edward Mordaunt** (instructed by **Holman Fenwick Willan LLP**)  
for the Defendant

**Fraser Campbell** (instructed by **Capital Law Limited**)

for the Third and Fourth Parties

*Hearing dates: 13 – 24 May 2024*

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## **JUDGMENT**

**Deputy Judge Nicholas Thompsell:**

**1. INTRODUCTION**

1. This case relates to events during a dark period for the world, when COVID-19 was spreading rapidly across the globe and governments everywhere were improvising their responses to this dreadful threat. A key element of this response was the procurement of Personal Protection Equipment ("**PPE**") including masks.
2. I shall refer to the First Claimant by its trading name, "**Hitex**". Hitex was a manufacturer of medical supplies in Jordan. Early in 2020 it turned to the production of medical masks. Hitex entered into a contract for the sale and purchase of masks (the "**Supply Contract**") with the Defendant ("**Uniserve**") at the height of the COVID-19 pandemic in April 2020. The contract had been arranged by the Second Claimant, which I will refer to as "**Caramel**" acting through the Third Claimant, ("**Mr Popeck**"), who was and remains Caramel's sole shareholder and director. These parties were to be rewarded by Uniserve by means of an introduction and supply agreement ("the **Commission Contract**") entered into alongside the Supply Contract.
3. Mr Popeck was an experienced businessman who operated principally within the fashion trade acting generally as a middleman buying from manufacturers or other wholesalers and selling to retailers. At this point he had had no experience in supplying PPE, but he was astute to the opportunity for profit caused by the soaring demand for PPE that was evident by this time.
4. Uniserve is an English company which, at that time, had focused on providing logistical support in relation to the transport of goods. It was well connected with the UK Department of Health and Social Care (the "**DHSC**") and also saw the opportunity to profit by moving into the supply of PPE.
5. Under the Supply Contract, Hitex agreed to supply 80 million masks to Uniserve on various dates in April to July 2020. Hitex claims that Uniserve, in breach of contract, failed to receive and pay for the great majority of the masks and claims damages of US\$23,100,000 and interest.
6. Uniserve's defence is that Hitex failed to meet its contractual obligations as regards delivery of the masks and that it terminated the Supply Contract for Hitex's breaches.
7. Uniserve has a counterclaim against Hitex for the sum of US\$300,000 which it paid to Hitex in respect of an invoice which was assigned to Caramel and also claims that it was induced to enter into the Supply Contract and the Commission Contract by a fraudulent or negligent misrepresentation.
8. Caramel and Mr Popeck also claim £19,250,000 from Uniserve, which they contend is due under the Commission Contract, or alternatively damages, and interest. Uniserve denies that that, or any, sum is due under the Commission Contract or that it is in breach of it.
9. The Third Party ("**Maxitrac**") acted on behalf of Uniserve in arranging the Supply Contract and later was involved in the management of that contract. The Fourth Party ("**Dr Stead**") was Maxitrac's sole director and shareholder.

10. The relationship between these parties and Uniserve originally arose by means of an agreement evidenced by an exchange of emails between Mr Iain Liddell (“**Mr Liddell**”) of Uniserve on 29 March 2020, which has been referred to as the “**Initial Agreement**”, and later was governed by a written agreement dated 2 June 2020 (the “**Maxitrac Contract**”). Dr Stead guaranteed Maxitrac’s obligations to Uniserve under the Maxitrac Contract.
11. Uniserve has brought Part 20 proceedings against Maxitrac and Dr Stead for declarations that they are liable in damages or to indemnify Uniserve to the same extent that Uniserve is liable to the Claimants and that Dr Stead is liable to Uniserve as guarantor of Maxitrac. Those claims are denied.

## 2. PROCEDURAL HISTORY

12. Hitex’s claim was originally issued in December 2020. Hitex’s Particulars of Claim have been amended and re-amended. During the course of the trial there was a further small amendment to its pleadings which, in the absence of objection on the part of Uniserve, Maxitrac or Dr Stead, I allowed.
13. The case has proceeded in the usual manner for cases of this type, and I will not recount the full procedural history. However, two elements of the procedural history are worth noting.
14. The first is that Ms Joanne Wicks KC (then QC), sitting as a deputy judge of the High Court, heard an application for summary judgment brought by the Claimants against Uniserve and provided her judgment in relation to that application on 10 February 2022.
15. The learned judge did not grant Hitex the summary judgement it sought but did give summary judgment in respect of a claim that had been advanced by Caramel against Uniserve for the sum of US\$300,000 (plus interest) which was part of the price under the Supply Contract and had been the subject of an invoice which she found had been validly assigned to Caramel by Hitex. She also made a finding in relation to a matter which I will discuss further below.
16. The second is that Uniserve has through an order of Mr Peter Knox KC dated 16 December 2022, following an *ex parte* hearing, obtained a worldwide freezing order against the assets of Maxitrac and of Dr Stead. This was continued by Meade J following a return hearing at which neither of those parties were represented. Maxitrac and Dr Stead subsequently applied for the freezing order to be discharged. This matter was heard before Mr Richard Farnhill sitting as a deputy judge of the High Court and he dismissed the application.

## 3. THE KEY ISSUES

17. As between the Claimants and Uniserve the key issues may be summarised as follows:
  - i) Was Uniserve induced to sign the Supply Contract by a fraudulent or negligent misrepresentation?
  - ii) Was Hitex in breach of its original delivery obligations?

- iii) Was there acceptance by Uniserve of an alternative delivery schedule effectively amending the original contract, or alternatively is Uniserve subject to any form of estoppel to prevent it relying on the original delivery schedule?
  - iv) Was Hitex in breach of its revised delivery obligations?
  - v) Did Uniserve terminate that contract (and thereby the Commission Contract) for breach?
  - vi) If damages are due, what is the measure of those damages?
18. As between Uniserve and Maxitrac/Dr Stead, the principal issues may be summarised as follows:
- i) Were/was Maxitrac and/or Dr Stead in breach of contractual or other obligations to Uniserve in agreeing or purporting to agree a variation to the delivery dates in the Supply Contract?
  - ii) Were/was Maxitrac and/or Dr Stead in breach of contractual or other obligations to Uniserve in failing to terminate the Supply Contract?
  - iii) If Maxitrac is found liable in relation to either such matter, but Dr Stead is not himself directly liable, is he liable as a guarantor under the Maxitrac Contract?
19. It is agreed by all parties that the points between Uniserve and Maxitrac/Dr Stead have importance only if Uniserve is found to be liable to the Claimants.
20. These issues largely follow the chronological course of events. I will deal with the facts and the relevant law as we trace through the events.
21. Please note that, unless specifically otherwise stated, all references in this judgment to dates are references to dates in 2020.

#### **4. THE EVIDENCE**

22. A great deal of evidence was available to the court, but many things were missing which would have been useful to get to the bottom of certain points.
23. In relation to written evidence, as well as copies of the relevant agreements, the court had access to a substantial body of emails between the parties and other witnesses which form a helpful contemporaneous measure. There were also some recordings of telephone conversations which had been made by Dr Stead, which were also helpful as a contemporaneous record. Given Dr Stead's evidence that he recorded all his telephone calls except when he was out of his office, it was slightly surprising that he did not disclose a greater number of relevant telephone calls. I accept his evidence that he did not record conversations when he was outside his office but given that the United Kingdom was on lockdown at this period, it is surprising that he was taking (and initiating) important calls that were not recorded.
24. Another important piece of evidence comprises what were referred to as daily "Production Reports", although this was something of a misnomer as these reports, the court heard, effectively recorded movements in and out of the main warehouse, rather than recording the production on particular day. The court heard that the machine operators producing the masks also produced handwritten daily reports of the masks

they have produced that day. It would have been very helpful to the court to have had these reports and it is unclear why they were not made available.

25. The court heard from witnesses including:
- i) for the Claimants: Mr Popeck; Mr Al Ghrabili (the Chief Executive Officer and general manager of Hitex); and Mr Ashraf Khader, who was at the relevant time the Operations and Export Manager for Hitex; and
  - ii) for Uniserve: Mr Liddell, who is the founder of Uniserve and its managing director; and Mr Leighton Bonnet, who at the relevant time had the job title of Air Freight Director at Uniserve, although he was not a board director; and
  - iii) for the Third and Fourth Parties: Dr Stead.
26. There were other persons who could have been helpful to the court who were not called as witnesses. These included on the Claimants' side, Mr Mohamad Alsakka and Mr Andrew Waller who were contacts of Mr Popeck and who played a significant part in the matters under consideration. A glaring omission on the Uniserve's side was the absence of any witness evidence from a representative of Majlan International Cargo Services ("**Majlan**"), who played a key role.
27. Insofar as it is necessary to rely on witness evidence in this case, I must have regard to the warnings as to the fallibility of human memory given by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22], including the unreliability of memory when it comes to recalling past beliefs, the considerable interference with memory that may be introduced in civil litigation by the process of preparing for trial, and the potential for powerful biases where witnesses have a stake in a particular version of events. I bear in mind that the passage of time can cloud or distort memory and that it is unlikely to be the case that individual witnesses will be consistently reliable or unreliable.
28. I also bear in mind that some witnesses may, for whatever reason, have better (or less fallible) recollections than others.
29. This, in my view was certainly the case in the evidence before me. Mr Khader and Dr Stead each had a good recollection of the matters under consideration whilst the other witnesses were relying much more on having their memories jogged by the documentary evidence put before them, and reconstructing events on the basis of what they thought they would have done. Mr Popeck underwent major surgery for a heart condition during the period in question, which may have affected his memory. Mr Liddell at this time was dealing with a very large number of contracts (he suggested in cross-examination that he was dealing with 300 vendors from over 500 factories and managed over 15,000 purchase orders, in addition to the Supply Contract), so it is unlikely he would have had as great a grasp of the events in question as some of the other witnesses for whom the Supply Contract would have loomed larger in their minds.
30. There are a few places where key matters are not recorded in documentation and cannot be reliably determined from the witness evidence available. In such cases I must follow the guidance given by the Court of Appeal in *Natwest Markets Plc v Bilta (UK) Ltd (In*

*Liquidation*) [2021] EWCA Civ 680 at [51] to the effect that faced with a documentary lacuna:

“...the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness’s version of events; supporting or adverse inferences to be drawn from other documents; and the judge’s assessment of the witness’s credibility, including his or her impression of how they performed in the witness box, especially when their version of events was being challenged in cross-examination.”

## 5. REPRESENTATION

31. All parties were ably represented by counsel and supported by solicitors. The Claimants were represented by Mr David Lewis KC and Mr Edward Knight. Uniserve was represented by Mr David Walsh and Mr Edward Mordaunt. Mr Fraser Campbell represented Maxitrac and Dr Stead. I was pleased to see that Mr Knight and Mr Mordaunt were both given opportunities in closing to speak before the court and, if I might say so, each discharged themselves creditably under heavy questioning from the Judge.
32. I am obliged to all counsel for the very clear and comprehensive way in which they each presented their clients' respective cases and to the solicitors for the compilation and presentation of the voluminous bundles of evidence and of authorities that were presented.

## 6. HOW THE PARTIES CAME TO KNOW ONE ANOTHER

33. Mr Popeck may be considered to be the central figure in bringing about the Supply Contract.
34. According to his witness evidence (which there is no reason to doubt on this point) Mr Popeck saw an opportunity in February 2020 when the Covid-19 pandemic was in its early stages, to benefit from the likely coming high demand for PPE including medical facemasks. Mr Popeck originally made enquiries of a friend and colleague in Istanbul called Mr Ibrahim Tetik to explore the possibility of sourcing PPE from Turkey. Mr Tetik introduced Mr Popeck to Mr Alsakka, a friend of Mr Tetik based in Dubai.
35. Mr Alsakka and Mr Popeck began corresponding via WhatsApp on 5 March 2020. Mr Alsakka informed Mr Popeck about the existence of Hitex. Mr Popeck was extremely interested to do business with a manufacturer in Jordan and asked Mr Alsakka to inspect the factory. In reliance on favourable reports from Mr Alsakka, Mr Popeck agreed to pay Hitex \$500,000 (or possibly a higher sum - the evidence on this is not entirely consistent) to “block-book” production. It seems that this arrangement was a very informal one, with no written agreement and no specific agreement relating to dates, quantities, or prices. Mr Popeck gave evidence that this was not unusual for him to deal in such an informal manner when an opportunity presented itself that needed to be dealt with quickly.
36. The nature of this arrangement may be important to some of the issues to be discussed later. Having block-booked production, Mr Popeck regarded himself as the person who would decide where Hitex’s production would be sold. He originally wanted to act as a

reseller of the production to Uniserve and was persuaded only reluctantly to the arrangements that were finally entered into whereby Uniserve would contract directly with Hitex and he would receive a commission through the Commission Contract, rather than making a profit as a reseller.

37. Mr Popeck became aware of Uniserve also through indirect means. Mr Popeck had a business contact called Mr Andrew Waller. It was Mr Waller who identified the opportunity to sell masks to Uniserve, which had a good relationship with the DHSC, and (as proved to be correct) seemed able to obtain a contract with DHSC for the supply of masks.
38. It is less clear who Mr Waller originally contacted. Mr Liddell's evidence was that Dr Stead had identified Hitex as a manufacturer. Dr Stead's evidence is that Mr Liddell had already been in discussions with Mr Waller and asked Dr Stead to handle negotiations for a contract.
39. Dr Stead's witness evidence is, to a degree, at odds with the case made on his behalf by Mr Campbell in his Skeleton Argument. This is that Maxitrac, through Dr Stead, was instrumental in introducing Hitex to Uniserve. Perhaps the two statements can be reconciled if Mr Liddell knew of Mr Waller but did not know which supplier Mr Waller was seeking to introduce and it was Dr Stead that found out about Hitex through Mr Waller. This is speculation but happily this is not a point I need to determine.
40. I will determine however that as Dr Stead clearly had the better recollection of events, I prefer his evidence on the question of who Mr Waller originally contacted. This has some bearing on the case. If Mr Waller was referred to Dr Stead by Uniserve, and was told by Uniserve that Dr Stead would conduct negotiations and later be involved in the management of the company, this may be a relevant factor in the characterisation of the role of Maxitrac/Dr Stead in these matters.
41. The naissance of the Supply Contract set up the perfect conditions for miscommunications to take effect. At no point was Uniserve directly in contact with Hitex. Any information originally received from Hitex would pass through a number of intermediate communicators – including Mr Alsakka, possibly Mr Tetik, Mr Popeck, Mr Waller, and Dr Stead before it reached Uniserve. This point is relevant when we come to consider the misrepresentation claim.

## 7. THE MISREPRESENTATION CLAIM

### *i) The alleged misrepresentations*

42. Uniserve first introduced into the pleadings its claim for misrepresentation in its Amended Defence and Counterclaim dated 24 June 2022, so the claim is something of an afterthought. Uniserve alleges that it was induced to enter the Supply Contract and the Commission Contract by representations about the ability of Hitex to meet the delivery schedule required by the Supply Contract. The Supply Contract required delivery as follows:
  - i) 6 million units on 28 April 2020;
  - ii) 5 million units on each of 5, 12, 19 and 26 May 2020;
  - iii) 7 million units on each of 7 and 14 July 2020; and



- iv) 5 million units on 21 July 2020.
43. The representations identified in the Amended Defence as misrepresentations that were allegedly relied upon were in the form of an email sent by Mr Waller to Dr Stead on 9 April 2020 (the “**Waller Email**”) where Mr Waller stated that:
- “there are 5 million available on 15<sup>th</sup> and 5 million on 22<sup>nd</sup> April. We can then produce 5 million a week from there on in.”
44. Uniserve further pleads that:
- “These representations were repeated or reaffirmed (expressly and/or implicitly) with revised quantities and dates by the subsequent negotiations, in which – although the precise quantities and dates changed in the draft and then final terms of the Supply Agreement – Hitex and Caramel affirmed that Hitex would be able to supply at least 5 million units a week from the outset.”
45. Uniserve has not particularised in its pleadings the alleged repetition or reaffirmation of these matters.
46. In Uniserve’s opening statement, the following matters were identified as constituting repetition and reaffirmation of the information in the email from Mr Waller:
- i) that these statements were repeated or reaffirmed expressly and/or implicitly with revised quantities and dates by the subsequent negotiations in which Hitex and Caramel affirmed that Hitex would be able to supply at least 5 million masks a week from the outset (although the precise quantities and dates changed in the draft and then final terms);
- ii) and in particular that
- a) on 19 April 2020 Mr Popeck wrote to Dr Stead that:
- “There has been there has been a misunderstanding between us on the delivery timetable. This may be my fault because of my condition after my operation. Delivery will be as follows 28<sup>th</sup> April 5 million ... 5 million in May... On the fourth... 11<sup>th</sup>... 18<sup>th</sup>... and 25<sup>th</sup>. In June 10 million every week. There is a very good chance that from middle June can increase to 20 million”; and
- b) on 22 April 2020 (before the Supply Contract was signed) Mr Popeck wrote to Dr Stead saying that:
- “the first delivery can now be 6 million instead of 5 million”, and
- “the volumes in June and July will be 7,000,000 per week.”
- iii) In Uniserve’s written closing submissions, Uniserve also identifies a statement by Mr Al Ghrabili to a representative of Majlan, Uniserve’s shipping agent, on 16<sup>th</sup> April when Majlan visited Hitex’s factory that they would be able to reach the delivery of 5 million masks per week within a few days.

47. I will discuss below the extent to which these further statements can be seen as repeating or reaffirming the email from Mr Waller, but I will comment now that these statements cannot found the basis of a claim for a fraudulent misrepresentation in their own right.
48. It is trite law that fraud must be specifically pleaded. Uniserve pleads deceit, which is a variety of fraud. The allegedly confirmatory statements outlined above were not specifically pleaded as being fraudulent misrepresentations that were relied upon. As they were not specifically pleaded as such, Uniserve has not put forward a case that is based on these representations being fraudulent.
49. As well as pleading deceit, Uniserve pleads in the alternative liability pursuant to section 2(1) of the Misrepresentation Act 1967 ("**s.2(1) MA 1967**"). This is in the following terms:
- "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true."
50. Even though an action under s.2(1) MA 1967 does not require proof of fraud, nevertheless, I consider that the specific alleged misrepresentation relied upon needs to be identified in pleadings. This is, not least, to meet the requirements for pleadings under CPR rule 16.5(2) and paragraph 8.2(3) of Practice Direction 16. Whilst the latter requirement applies to a claimant rather than a defendant, it is in my view nevertheless apposite in setting out the court's expectations whenever a party is depending on misrepresentation for the purposes of a defence. In any case, it applies to Uniserve as Uniserve is a claimant in relation to its counterclaim.
51. Uniserve goes on to say that the representations were false as Hitex had not already manufactured 10 million units; Hitex was unable to manufacture or make available 5 million units a week whether from 15 April (per the Waller Email and original draft Supply Agreement) or 28 April (per the final terms of the Supply Agreement).
52. Uniserve further pleads that neither Hitex nor Caramel had reasonable grounds for stating that Hitex could manufacture and/or make available 5 million units a week (whether from 15 April or 28 April).
53. Uniserve pleads that it is to be inferred from the immediate failure of Hitex to perform according to the Supply Agreement that, at the time at which the representations and/or at or prior to the time that the Supply Contract and Commission Contract were made:
- i) Hitex and/or Caramel knew that they were not true; and/or
  - ii) Hitex and/or Caramel had no belief in their truth; and/or
  - iii) Hitex and/or Caramel were reckless, in that the representations were made not caring whether they were true or false, and/or Hitex and/or Caramel had no reasonable grounds to believe that they were true.

54. As the Uniserve's counsel, Mr Walsh and Mr Mordaunt, point out in their skeleton argument, the elements for a successful claim of misrepresentation are well known. I was referred to *SK Shipping v Capital VLCC* [2021] 2 Lloyd's Rep 109 at [112]-[117]; *CJ and LK Perks Partnership v Natwest Markets plc* [2022] EWHC 726 (Comm) at [155]-[156] and *Farol Holdings v Clydesdale Bank plc* [2024] EWHC 593 (Ch) at [205]-[206]. I agree with counsel's conclusions from these cases that for Uniserve's allegation of misrepresentation to succeed, Uniserve needs to persuade the court of the following matters:
- i) that the representations complained of were made by Hitex;
  - ii) that the representations were false;
  - iii) that the representations, were made either knowing them to be untrue or recklessly not caring whether they were true or not;
  - iv) that the representor must intend for the representee to rely on the statement in the sense that it was false; and
  - v) the representee must in fact have been induced to take action – for example entering into a contract – in reliance on the representations. However, the misrepresentations need not be the only reason for the representee's decision to enter into the contract.
55. Timing may be important to various elements of the above formula: in particular the truth of the statements, and the representor's knowledge and state of mind, each need to be tested in the first place at the time the representation is made.
56. However, this may not be the only time that is relevant. It is necessary to consider what happens if there is a change in circumstances between the original making of a representation and the point in which reliance is placed on the representation in the form of signing the Supply Contract.
57. The formulation set out in the Uniserve's pleading, has the effect that:
- i) the statements in the Waller Email were untrue when made or became untrue prior to the time that the Supply Contract and Commission Contract were exchanged; and
  - ii) that at either of both such times:
    - a) the representations were known by Hitex to be untrue, or
    - b) Hitex had no reasonable grounds for these statements and/or had no belief in their truth, and/or
    - c) Hitex was reckless in that the representations were made not caring whether they were true or false.
- i) Was the alleged misrepresentation made by Hitex?**
58. As noted above, the only false representations specifically pleaded were those in an email between Mr Waller and Dr Stead. For Uniserve to succeed in a misrepresentation claim against Hitex, (and thereby establish the circularity of action that it pleads) it must show that these representations were made by or on behalf of Hitex.
59. There are two ways in which Uniserve could show this.

60. First, it could show that Mr Waller was authorised in some way to speak on behalf of Hitex.
61. I do not consider that this point has been established. Mr Waller was not a director or employee of Hitex. There is no evidence that he was appointed as an agent of Hitex. He had no position that would give him usual authority to make representations on behalf of Hitex. There is no evidence that Hitex had said anything to Uniserve to provide him with apparent authority.
62. The best case that could be made out for Mr Waller to have been given authority on behalf of Hitex would be that Mr Waller had been granted authority by Mr Popeck/Caramel and that Mr Popeck or Caramel had been granted authority to make representations on behalf of Hitex. However, even if it can be shown that Mr Popeck or Caramel had authorised Mr Waller to speak on his/its behalf, we are still lacking any evidence that Hitex had authorised Mr Popeck and/or Caramel to make representations on its behalf.
63. As noted above, Mr Popeck, having pre-booked capacity, considered that masks were his to sell. He expected that his company would be the supplier of the masks at a profit, and only later was persuaded that he would obtain a commission (from Uniserve) instead. In my view the best interpretation at this stage was that Mr Popeck/Caramel was acting on his/its own behalf and not as an agent of Hitex. Mr Popeck, under the Supply Contract, once it was signed, would become authorised to deal on behalf of Hitex, but until that point, there is no reason to consider that when Mr Popeck spoke he was making representations on behalf of Hitex. If he was not authorised to make representations on behalf of Hitex, then neither was Mr Waller.
64. The second way that Uniserve might show that the representations in the Waller Emails were made by Hitex is to show that Hitex caused these representations to be made directly or indirectly by making statements to Mr Waller, or to Mr Popeck expecting him to pass these on directly or indirectly to Uniserve, and with a view to these statements being passed on to induce Uniserve to rely on these representations.
65. I do not consider that this point has been established either. Whilst this is not entirely clear, it appears that Mr Waller sourced the information in the Waller Email from Mr Popeck. Mr Popeck in his witness statement said that he was the one giving Mr Waller information so that he could assist with finding buyers.
66. It is certainly the case that on 7 April 2020 Mr Popeck sent an email to Mr Waller attaching certain certificates and pictures (which will become relevant later) and stating (amongst other things)

“delivery 5 million per week starting on the 15<sup>th</sup> April. I have 60,000,000 booked!!”
67. This email related to the masks expected to be received from Hitex.
68. According to Mr Popeck’s evidence in cross-examination this statement was not specifically directed to Uniserve but was intended more generally as the basis on which Mr Waller should approach potential buyers for orders.
69. It may be noted this statement is not a representation as to production capacities, it is proposed terms for an agreement.

70. The source of Mr Popeck's information which caused him to feel able to offer delivery on these terms is unclear. Mr Popeck's own memory at this time was understandably hazy as we are talking about matters that had arisen some four years ago. and only a week or so later, on 16 March, he had undergone major heart surgery. Whilst in his witness statement Mr Popeck said that the information given to Mr Waller was based on information from Mr Alsakka, he agreed in cross-examination that only a week later he was asking Mr Alsakka for a delivery schedule and that "on balance" it was correct that on 12 April he did not know how many masks could be delivered by Hitex in Jordan and did not know when any deliveries could be made.
71. As to where Mr Alsakka might have got his information, it appears from Mr Khader's oral evidence that Mr Khader was having discussions about production capacity with Mr Alsakka, but Mr Khader had no recollection of any specific discussion.
72. Mr Walsh suggested to Mr Popeck that he was plucking figures out of the air. Whilst Mr Popeck denied this, he was not able to explain any source for the information other than to speculate, unconvincingly, that he may have had the figures via Mr Tetik. Mr Popeck was clearly suffering at this point in his cross examination.
73. It is likely that Mr Popeck had some reason for believing that he could contract to supply the figures mentioned in his email of 7 April. It is most likely that his understanding came via Mr Alsakka, but it seems likely also that any understanding came as a result of messages being garbled in translation. For example, it is quite possible that there had been discussions of the capabilities of the new automatic mask machines that were on order, and that an originally carefully worded message explaining what production capacities were going to be, assuming that machines arrived when they were expected to, became oversimplified as it was transmitted from one person to another into a bald statement as to when supply would become available.
74. There is no evidence before the court to show that anyone at Hitex deliberately sent misleading information to Mr Popeck or to Mr Alsakka or to Mr Waller with a view to inducing Uniserve to enter into a contract.
75. Certainly, I think it is extremely unlikely that such information would have come from Mr Khader. Mr Khader told the court that if he had been asked prior to 15 April if Hitex could produce 5 million masks at any point prior to May, he would have said no.
76. In summary, the only representation that is pleaded as being a fraudulent misrepresentation is that in the Waller Email. There is no evidence that Mr Waller was authorised by Hitex to make any representation. There is no evidence that Hitex directed the information in the Waller Email to be sent to Uniserve via Mr Popeck or Mr Waller or anyone else and, even if Hitex was the source of the figures, it is highly unlikely that these were presented by Hitex in the form of an representation intended to induce a buyer to enter into a contract. It is also unlikely that Hitex would have provided these figures without explaining that the ability to meet the figures would depend on the expected future, rather than the present, rate of production. I conclude that there is no evidence that the statements in the Waller Email were statements by Hitex.

***i) Did the Waller Email contain false information?***

77. As mentioned above, the statements in the Waller Email were as follows:
- “there are 5 million available on 15<sup>th</sup> and 5 million on 22<sup>nd</sup> April. We can then produce 5 million a week from there on in.”
78. The Waller Email may be considered to include two statements which need to be considered separately:
- i) the first statement relates to 5 million masks being available on 15 April 2020 and on 22 April;
  - ii) the second statement is that 5 million a week can be produced from 22 April.
79. As these statements were made on 7 April, each of these statements were statements about the future, and as such must be considered a prediction, or matter of opinion.
80. Uniserve argues that the first statement was a statement of fact that the stated quantities were already manufactured and/or that Hitex was able to make available the stated quantities of the stated dates. In my view neither formulation is quite correct. The first and second statements must be taken as a prediction that Hitex *will* be able to make available the stated quantities on the stated dates. In making such a statement the person making the statement would be entitled to take account of current stock levels, current rates of production, and, importantly, predicted future rates of production.
81. Uniserve's case on the second statement is that it was a statement of fact that Hitex had the ability to manufacture at the stated rate. This again is not quite correct in my view. This was a statement of opinion and/or expectation that the production capacity would be available from 22 April.
82. This is not to say that either of these statements is incapable of being a misrepresentation. As Bowen LJ put it in *Edgington v Fitzmaurice* (1885) 29 Ch D 459
- "the state of a man's mind is as much a fact as the state of his digestion... A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact...".
83. If the person making the statement does not believe the statement being made, then it is fraudulent.
84. Under section 2(1) MA 1967, these statements would be misrepresentations if the person making the statement did not have reasonable grounds for making the statement. The requirement for reasonable grounds is absolute (see the remarks of Lord Bridge in *Howard Marine v Ogden & Sons* [1978] 1 QB 574, at page 596:
- "In the course of negotiations leading to a contract the statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe."
85. Further, the fact that these statements should be viewed as a prediction or opinion does not prevent them from amounting to deceit. Lord Herschel in *Derry v Peek* (1889) 14 App Cases 337, at 374 explained the requirements to show deceit:

"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

86. If either of the statements was made with the knowledge or belief that it was untrue, or if a belief in its truth or recklessly or careless whether it be true or false, and the statements made were untrue, then fraud may be established.
87. It is necessary first to look at the representor's knowledge/belief/state of mind at the point at which the statement was made on 9 April.
88. As discussed above, Uniserve's pleaded position is that the representations were continuing representations. The relevant time for knowledge and/or belief or state of mind is pleaded to be the point at which the statements were made and/or any point at which Hitex and/or Caramel obtained such knowledge prior to the time that the Supply Contract and Commission Contract were made.
89. Uniserve's pleaded case is that it is also necessary to look at knowledge and state of mind during the entire period up to the creation of the Supply Contract. As regards these later points in time, however, the question is more nuanced. As we can see from the decision of the Court of Appeal in *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, which I also followed in in my decision in *ONS Ultimate Holdings Ltd & Ors v Nair & Anr* [2022] EWHC 2200 (Ch), if:
- i) a person who makes a representation that is true when made; and
  - ii) the representation becomes untrue; and
  - iii) the representor knows that he representee is relying on representation,
- then the representor may be under a duty to correct what he now knows to be a false representation.
90. However, for this duty to arise the representor must know that reliance is being placed on the representation and must have positive knowledge that the representation has become untrue.
91. Of course, when we are looking at matters of belief or recklessness, one has to consider the state of mind of the person making the representation. For example, Mr Waller (or Mr Popeck) might have had a genuine belief in the predictions he was making if he had received information from a source which he considered to be reliable and would not be reckless if it was reasonable for him to rely on that source.

92. Uniserve's case is based principally on the representations having been made by (or at least at the instigation of) Hitex via Mr Waller. However, in its written skeleton argument, Uniserve also draws the court's attention to a principle outlined in *The Siboen and The Sibotre* [1976] 1 Lloyd's Re 293 at 320-321 where it was said:
- "if one agent makes a statement honestly believing it to be true but another agent or the principal himself knows that it is not true, knows that the statement will be or has been made, and deliberately abstains from intervening, the Principal will be liable. In these circumstances the party with the guilty knowledge can himself be treated as being guilty of fraud."
93. The application of this principle to Hitex depends on Mr Popeck and/or Mr Waller being agents of Hitex and I have already found that Uniserve has not established this.
94. Further, the principle depends on the principal in question knowing that the statement will be or has been made. Hitex was not copied into the Waller Email and there is no evidence that Hitex became aware of it at any point prior to the making of the Supply Contract. No doubt that Hitex would have been aware generally about negotiations for the contract centring around quantities and delivery dates similar to those in the Waller Email, but that is different to saying that Hitex was aware that positive representations had been put forward as to its capacity to meet those requirements with a view to inducing the contract (even if the Waller Email can be regarded as including such positive representations, which, as I explain below, I do not consider to be the case).
95. As I have already stated, I do not consider that the Waller Email can be regarded as representations made by or on behalf of Hitex. Neither do I accept a proposition that seems to have been put forward in Uniserve's skeleton argument that Hitex through its pleadings has adopted Mr Waller's representation on its behalf. Nevertheless, for completeness, I will consider the position if Uniserve is right, that Hitex should be regarded as the author of the representations.
96. Hitex's case is that these representations were reasonably based having regard to the following facts:
- i) that Hitex had a large number of masks in stock (at 9 April some 4,349,200 masks according to the Production Reports);
  - ii) at 7 April Hitex expected the delivery under a contract dated 10 February 2020 (but signed by Hitex on 2 March 2020) of five new automated machines capable of producing somewhere between 100 and 120 masks a minute. Once these were all delivered (which under the contract was due within 15 days from signing) and commissioned (which in Mr Khader's evidence had occurred within 72 hours from delivery for the first machine and was expected to be a shorter in a shorter period for later machines) the production capability would increase to 5 million masks per week;
97. Although five new machines were originally expected somewhere around the last two weeks in March, there were delays in the machines being shipped. As it turned out, the machines were delivered on 4 April 2020, 19 April 2020, 28 April 2020 and two machines were delivered on 29 April 2020.



98. The position (according to the Hitex Production Report) is that at 9 April Hitex had some 4,349,200 masks, leaving a shortfall of 650,800 masks to produce by 15 April. If we assume that there were five clear days available to make masks between 9 April and 15 April, that would require a production rate of 130,160 masks per day to make up the shortfall.
99. As at 9 April, Hitex could produce masks using its existing semi-automated machine and a new fully automated machine. Mr Khader's evidence was that the machines were being operated 22 hours a day. At the expected rate of production, the new machine by itself was anticipated to have produced somewhere between 100 to 120 masks per minute. Over 22 hours (assuming no stoppage or production issues) therefore it could produce somewhere between 132,000 and 158,400 masks a day plus whatever the semi-automated machine could produce. I do not think we were informed as to the daily capacity of the semiautomated machine. The best indication we have is what Majlan was told when it visited the factory – around 20,000 per day.
100. These figures might have been expected on 9 April to be revised upwards if one or more machines had arrived and commenced production during the five-day period. They would be expected to be reduced, however, if there were sales to other parties during the period, and there was knowledge that the Jordanian government expected to be able to require 15% of the production on short notice.
101. If one looks at the Production Records to determine what actually proved to be available on 15 April, the Production Records show stock of 5,088,650 masks.
102. On the basis of the points in the previous three paragraphs, I consider that on 9 April Hitex would have had grounds to believe that it could supply 5 million masks on 15 April. Certainly, forming such a belief would have required Hitex to have an optimistic outlook, but if it had made a statement reflecting such a belief, I do not think that the statement could be characterised as being without any basis or that these facts demonstrate that Hitex must have been reckless as to whether the statement was true or false.
103. If we turn to the second part of the first statement (as to 5 million masks being available on 22 April), it is more difficult to see how this could have been true as a statement of Hitex's belief or if it was that it was reasonably based.
104. The first statement clearly contemplates that the 5 million masks to be made available on 22 April were in addition to those to be made available on 15 April, and as may be seen from the calculation above, on the basis of the production capacity available on 9 April, delivering 5 million on 15 April would be likely to exhaust both the store of masks available on 9 April and the better part of the additional masks that may have been created by 15 April. At the rate of production allowed by one automatic machine and the existing semi-automated machine it would not be possible to make enough additional masks to supply an additional 5 million masks on 22 April. Mr Khader confirmed in his witness statement that production was not expected to get up to the level of 5 million a week during April.
105. This is borne out by the actual figures shown in the Production Report which show only 1 million masks having been added during the period between 15 April and 22 April.

106. In response to this Mr Khader in his cross examination said that there may be further masks that had been produced but had not yet been entered into the system since it was his evidence (and that of Mr Ghrabili) that masks were only added into the system once they had been transferred to the main warehouse. It seems unlikely, however, that this was a significant factor since no further masks were entered into the system in the following three days of Production Reports.
107. My view is that if a statement had been made by Hitex on 9 April that it expected to be able to deliver both 5 million masks on 15 April and a further 5 million masks on 22 April, that statement could only be true if Hitex expected that all five new machines, or at least four of the new machines would have been received and running by 15 April.
108. If we turn to the statement that 5 million masks per week could be produced from 22 April, again that could only be true if Hitex expected that all five machines would have been received and running by 22 April.
109. As far as I can see, there was no direct evidence as to what was Hitex's expectation as at 9 April for when the further machines would be delivered. Mr Khader did say in cross examination, however, that in the last 10 days of April on the basis of air waybills of shipping for the machines, they were expected to be received during April. As it turned out, the machines were delivered on 4 April 2020, 19 April 2020, 28 April 2020 and two machines were delivered on 29 April 2020.
110. From the information available to me, it seems likely that as at 9 April Hitex could have had little confidence that four or five machines would be up and running by 15 April so as to have a basis for the statement that 5 million masks will be available by 22 April, or that 5 machines would be available 22 April so as to have a basis for the statement that 5 million masks could be produced from 22 April.
111. As discussed above, if these representations were made by Hitex (and made with the intention of their being relied upon by Uniserve), they should be regarded as continuing representations and that Hitex would have been under a duty to correct the representations if they became aware that the representations had become untrue as at a later date before Uniserve entered into the Supply Contract when it signed it on 23 April 2020.
112. By 23 April 2020, Hitex would have known that only two of the new machines had been delivered by that date, and therefore the second and third statements made within the Waller Email were clearly unfounded by that time.
113. I conclude that if Hitex had made the representations that were made in the Waller Email (which I do not consider to be the case) at least two of these representations were either false as a statement of Hitex's honest belief, or that Hitex would have been reckless or careless as to whether it was true or false.
114. I mention this, however, for the sake of completeness in my analysis since, as I have stated, I do not consider that Uniserve has established that Hitex had caused a representation being made to Uniserve that it intended Uniserve to rely upon to the effect that Hitex would have had no reasonable ground to believe that it could supply 5 million on 15 April and it has not been established that Mr Popeck and/or Mr Waller were agents of Hitex or that Hitex knew that a representation had been made with the intent to induce the contract.

115. As to whether Mr Waller or Mr Popeck could have had an honest belief in the figures, I cannot say. It is possible that they were cavalier about the figures quoted. It is also possible that they did on the basis of a misunderstanding of information indirectly relayed to them (or information that became out of date when it transpired that the new machines were not going to be delivered on time). I think that it is likely that they would have understood that reaching full production capacities depended on the installation of machines not yet received, but they may not have been kept up to date with the expected delivery dates for the machines and may have based expectations on earlier information about this.

*i) Were the representations in the Waller repeated or reaffirmed?*

116. Uniserve's pleading that the representations were repeated or reaffirmed (expressly and/or implicitly) with revised quantities and dates by the subsequent negotiations, makes no sense. One cannot confirm a statement that 5 million masks will be available on a particular date by making a different statement that 5 million, or 6 million masks can be delivered on a different date. As we have seen, Uniserve's case is not based on its reliance on these further statements. Uniserve's case is that it relied on the Waller Email and that there were further representations repeating or reaffirming the Waller Email.

*i) Did Hitex intend Uniserve to rely on the representations in the Waller Email?*

117. If the further statements identified at [46.] above have any relevance, it is that they support a point on behalf of Hitex that any representations made about future capacity were indicative rather than representations on which Uniserve was expected to rely. The discussions about contract dates were moving all the time and it was not Hitex' intention to induce reliance on any particular statement of capacities.

118. I agree with the point put forward in Hitex's closing submissions that the Waller Email was never intended to form the basis of a contract. It was simply informing Dr Stead that Mr Waller thought he had found a potential supply. In the circumstances at the time, Dr Stead and Uniserve could have assumed no more.

*i) Were the representations in the Waller Email relied upon by Uniserve?*

119. I do not consider that Uniserve was relying on the Waller Email in deciding to go ahead with the Supply Contract.

120. The fact is that Uniserve did not take on trust the information that was being provided to it by Mr Waller and Mr Popeck, but instead commissioned its own due diligence on the production capabilities of the factory. Mr Bonnett (on the instructions of Mr Liddell) commissioned Majlan to carry out due diligence. Dr Stead provided a list of questions for Majlan to check. Majlan reported back.

121. On 15 April 2020 Mr Bonnett provided instructions to Majlan asking them to check a number of matters including current volume of production per day/week; whether Hitex could manage the order currently or whether the new machine was essential to fulfilling the order volume. In a later email the same day, Majlan were given further instructions (following suggestions from Dr Stead) including instructions to take pictures of the production line; pictures of the storage bays and of stacked masks ready to ship; to ask the production line managers how many masks can be made on this machine per day; to ask casually "so this is where you will make 10,000,000 masks a week?".

122. Majlan inspected the factory on 16 April. Majlan reported back to the effect that the current volume of production was 25,000 masks per day on the semi-automated machine and 80,000 masks per day on the fully-automated machine and that they expected to increase the production line to four automated machines, and that some of these machines were in customs and some of them in shipping and will arrive soon. Mr Bonnett passed this email to Mr Liddell and also reported that once a new machine is installed early next week it would take production to approximately 180,000 per day so "*maybe 1 million a week*". He noted that he understood this to be shy of Uniserve's expectations.
123. Mr Liddell replied to Mr Bonnett the same day asking whether they had said anything about a new machine which he understood would push production up to 10 million a week.
124. Mr Bonnett replied, also the same day, that a new machine was expected but with the new machine installed they might manage 1 million units per week. He reported that "they didn't seem to think" that 5 to 10 million would be achievable in a matter of weeks. Mr Bonnett said he would organise a further inspection.
125. Also on 16 April, Mr Bonnett contacted Majlan to say that Uniserve was concerned about the ability of the business to fulfil the expected order volumes. Uniserve had been expecting to source 5 million a week initially moving to 10 million and from Majlan's advice and Mr Bonnett's discussion with Majlan it looked like only 1 million would be realistic.
126. On 17 April Mr Bonnett instructed Majlan to visit again on 20 April and ensure that the new machine had arrived. He expressed concerns that based on the feedback from Majlan even with the new machine arriving over the weekend Hitex would be able to achieve only around 1 million masks per week. He said that:
- "we urgently need to understand the exact capabilities for output per week. Ultimately this is going to define if we think we can continue with [Hitex]."
127. The instruction to visit on 20 April was changed to an instruction to visit on 23 April as Uniserve had been told that they would have three new machines installed by this date. Mr Bonnett instructed Majlan to establish whether the new machines were installed and whether realistically they would have the first order of 6.5 million masks ready by 27 April. In a later instruction on 23 April Mr Bonnett asked Majlan to count (and check the quality of) the stock available on that date.
128. Majlan reported back following their visit that the first new machine was working, a second one was being tested, and the third machine was the original semi-automatic machine. Majlan reported as regards the production plan that they would prepare 1 million by the end of April and that there was no cargo ready. In a further email Majlan confirmed, also on 23 April, that three new machines were on their way so that five machines would be working in the next week.
129. Mr Liddell in his second witness statement claims that he would not have entered into the Supply Contract if he had not been told that the Hitex had 5 million masks available on 15 April 2020 and 5 million masks available on 22 April 2020 and have the production capacity to produce a further million facemasks every week from then on. In my view this is simply not true.

130. Mr Liddell sought in cross examination to distance himself from the due diligence efforts, saying that he was relying on Dr Stead. Nevertheless, he was copied into emails and was aware that the results of the due diligence contradicted the information in the Waller Email. By 23 April, Uniserve as an organisation was clearly aware that the predictions of supply and production information in the Waller Email were proving incorrect. This was known by Mr Bonnett, it was known by Uniserve's representative Dr Stead, and it was known by Mr Liddell.
131. The question of inducement is one of fact. It is apparent from the authorities that the test is not necessarily whether the representation was believed but rather whether the representation in fact induced the contract.
132. As is noted at *Chitty on Contracts* at 10-045 in *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48 at [44], the Supreme Court held that a settlement of an insurance claim could be avoided by the insurer when it discovered that the amount of loss had been exaggerated fraudulently, even though at the time of the settlement the insurer had doubts over the extent of the claim. It was sufficient that the false claim influenced the insurer in the sum offered in settlement. Lord Clarke said that even in a case in which the claimant knows that the representation was a lie, the claimant “*may be able to establish inducement on the facts*”. No doubt Lord Clarke is correct in this, but the cases where someone is induced by a statement that is known or believed by that person to be false are likely to be few.
133. In the case before me, I am satisfied that the facts are that the Waller Email did not induce Uniserve to enter into the Supply Contract. It is fanciful to believe that Uniserve was still relying on these in preference to its own due diligence which clearly contradicted these statements. The circumstances are similar to those in *Hartlelid v Sawyer & McClockin Real Estate Ltd* [1977] 5 W.W.R. 481, mentioned in *Chitty on Contracts* (35<sup>th</sup> Edition) at 10-042. Here an estate agent's particulars misrepresented the size of a garage, and the buyer had examined the whole property thoroughly on two separate occasions. It was held that the misrepresentation had had no effect.
134. Further, Mr Liddell's statement, that he would not have entered into the contract had this statement not been made, is entirely at odds with Mr Liddell's actual response when he found out conclusively that these statements were not proving to be true. He did not immediately cancel the contract, but instead commissioned Dr Stead to sort out a solution and then accepted a solution involving later deliveries.
135. Uniserve's counsel in their written closing statement made the point that a misrepresentation claim can be founded even if the representation relied upon was only one element of matters relied upon. I do not see, however, how this point advances Uniserve's case. Uniserve could not at the same time believe that the statements in the Waller Email would prove true and that the information it received from Majlan was true. It would have to decide whether it relied on one or the other. There can be no doubt that it would rely on its own investigations in preference to a prediction made some three weeks earlier by the agent of a middleman who was seeking to put the deal together.
136. I find that Uniserve was not relying on the Waller Email (or indeed on any of the other predictions as to production and stock availability that had been made) when it signed the Supply Contract on 23 April. It entered into the Supply Contract in the knowledge that these predictions were unlikely to be met.

137. This was not at all a strange decision for Uniserve to make. Uniserve had already on 14 April executed a supply contract with DHSC. It seems, however, that the volumes in that contract were not initially tied down. Whilst Mr Liddell's oral evidence was that he thought that there would have been a schedule of delivery amounts and times attached to the contract with DHSC, I do not think this was correct. The contract does not mention any such schedule, it just states delivery dates "TBC". Uniserve, therefore might reasonably be expected to have considered tying down the Supply Contract was in its interest even if it believed that the masks were likely to be supplied later than on the dates originally promised in the Waller Email or in the Supply Contract and knew that the delivery of the masks was dependent on new machines arriving since at this stage it had not committed to DHSC in relation to a particular delivery schedule.
138. Also, Uniserve had nothing to lose in signing the Supply Contract as it could rely on the term in the Supply Contract making time of the essence and so could escape the Supply Contract if it found that delays in supplying the masks would cause it difficulty.

*i) The effect of Clause 26.6 of the Supply Contract*

139. Another point relevant to the misrepresentation claim relates to the provisions of clause 26.6 of the Supply Contract which is as follows:

"Each Party acknowledges and agrees that it has not relied on any representation, warranty or undertaking (whether written or oral) in relation to the subject matter of this Contract and therefore irrevocably and unconditionally waives any rights it may have to claim damages against the other Party for any misrepresentation or undertaking (whether made carelessly or not) or for breach of any warranty unless the representation, undertaking or warranty relied upon is set out in this Contract or unless such representation undertaking or warranty was made fraudulently."

140. This clause is in my view a complete answer to the misrepresentation claim under s.2(1) MA 1967. It would not, however, protect the Claimants from a case in fraud including a claim for deceit.
141. Mr Walsh has advanced at different times two arguments as to why this clause would not protect Hitex from a misrepresentation claim under section 2(1) MA 1967.
142. The first argument was that the representations in the Waller Email can be regarded as having been set out in the Supply Contract (and therefore subject to the exception mentioned within clause 26.6) as the contract set out delivery dates. I think Mr Walsh may have later withdrawn this suggestion, but for the record I will confirm my ruling that this is not a good argument. The fact that the Supply Contract set out dates for delivery cannot be regarded as a repetition of a *representation* as to production capacity. In any case, the dates for delivery in the Supply Contract were not the same as those mentioned in the Waller Email, although there was some overlap in that 5 million masks a week were being contracted for as from 5 May.
143. The other argument that I think was suggested at one stage was that in the circumstances this was an unfair term and should not be relied upon pursuant to the Unfair Contract Terms Act 1977. As this was a contract that had been produced by Uniserve, and there was, in my view, no inequality between the parties, and as entire agreement provisions of this type are entirely normal in commercial contracts and serve a useful purpose, I do not think that any such argument can be sustained.

*i) Summary in relation to the Uniserve's misrepresentation claim*

144. Uniserve's misrepresentation claim against Hitex must fail. First, Uniserve has not demonstrated that the pleaded misrepresentation was one made by Hitex, rather than by Mr Waller or by Mr Popeck. Secondly, Uniserve has not established that, to the extent that the Waller Email was based on any statement made on behalf of Hitex, that the statement was made with a view to inducing the contract with Uniserve, rather than a mere expected indication of capacities as a basis for negotiations. Thirdly it is entirely clear that the statement was not in fact relied upon by Uniserve.
145. To the extent that Uniserve's claim for misrepresentation relies on any statements other than those in the Waller Email, the claim for deceit certainly must fail because these statements were not specifically identified in pleadings and fraud must be specifically pleaded. In my view, as explained above, the same is true in relation to the s.2(1) MA 1967 claim. But even if this is wrong, Uniserve was never going to get anywhere with a claim under s.2(1) MA 1967 as this is validly precluded under the entire agreement clause contained in the Supply Contract.

## **8. THE SUPPLY CONTRACT**

*i) The entry into the Supply Contract*

146. The Supply Contract was dated 21 April 2020, but in fact was signed on behalf of Hitex on 23 April. The draft contract was sent to Mr Popeck and Mr Liddell on 21 April. On 22 April Mr Popeck wrote to Dr Stead with a revised schedule, asking for the contract to be returned with the revised quantities and promising that Hitex would immediately sign and return the contract once it was amended with the revised numbers. I could not find in the bundle a copy of the counterpart of the agreement signed on behalf of Uniserve, but I note that the contract signed on behalf of Uniserve was sent by Dr Stead to Mr Alsakka on 24 April at 11:07 am. The Commission Contract was sent by Dr Stead to Mr Popeck on 24 April at 10:44 am. This was signed by Mr Bruce Chaplin, the finance director of Uniserve. As with the Supply Contract, the agreement was dated 21 April 2020. It was Mr Liddell's oral evidence that Uniserve had signed the agreement on 21 April, but as he probably was not the signatory, and his recollection of events seems to have been reconstructed rather than a distinct memory of these events, I will prefer the documentary record to Mr Liddell's recollection. I find that the contract was not exchanged until 24 April, and certainly that Uniserve did not commit itself to the contract until after the inspection that Majlan carried out on its behalf on 23 April.

*i) The terms of the Supply Contract*

147. I have already set out at [42.] above the delivery schedule provided for by the Supply Contract. Some other terms are worthwhile mentioning.
148. The Contract was formed in five parts. The first part under the heading "Terms and Conditions for the Supply of Goods" included an Order Form. To this there were annexed four schedules:
- i) "Key Provisions";
  - ii) "General Terms and Conditions"
  - iii) "Definitions and Interpretations"; and

- iv) "Additional Special Conditions".
149. The Order Form set out the requirement to supply the "*Deliverable described below*".
150. This deliverable (or rather deliverables) were defined as Type IIR Surgical Disposable Fluid Resistant Marks, to be collected ex-works from the factory address in Jordan. Mr Alsakka was mentioned as the contact name. Packaging instructions were included.
151. As to what was meant by delivery, this was explained in clause 2.2 of the General Terms and Conditions. This provided as follows:
- "Delivery shall be completed when the Goods have been unloaded at the location specified by Uniserve and such delivery has been received by a duly authorised agent, employee or location representative of Uniserve. Uniserve shall procure that such a duly authorised agent, employee or location representative of Uniserve is at the delivery location at the agreed delivery date and times in order to accept such delivery" ...."
152. Other relevant points in relation to delivery include that:
- i) the Supplier was obliged under clause 2.3 of the General Terms and Conditions to ensure that a delivery note containing certain information shall accompany each delivery of the goods;
  - ii) under clause 2.4 of the General Terms and Conditions, Uniserve was entitled to refuse part deliveries and/or deliveries outside of agreed delivery times/dates; unless Uniserve has agreed in writing to accept such deliveries;
  - iii) under clause 5.1 of the Key Provisions time was said to be of the essence as to any delivery dates under this contract and if the Supplier fails to meet any delivery dates this shall be deemed to be a breach incapable of remedy for the purposes of clause 12.4 of The General Terms and Conditions.
153. Clause 12 of the General Terms and Conditions included provisions for termination of the Supply Contract. There was a remediation process for terms that were capable of remedy. Under clause 12.4, if a material breach was incapable of remedy the innocent party may terminate for breach by serving a Termination Notice. A Termination Notice is defined as:
- "a written notice of termination given by one Party to the other notifying the Party receiving the notice of the intention of the Party giving the notice to terminate this Contract on a specified date and setting out the grounds for termination".
154. Clause 22 of the General Terms and Conditions set out provisions relating to notices. Notices needed to be in writing quoting the date of the contract. They could be delivered by hand, by first class recorded delivery or by email "*to the person referred to in the Key Provisions or such other person as one Party may inform the other Party in writing from time to time*". The Key Provisions did not in fact nominate any such person. However authorised representatives were identified in the Order Form, being Mr Liddell or, in his absence, Bruce Chaplin for Uniserve and Mr Alsakka or, in his absence, Mr Popeck for Hitex.



155. The Order Form included a heading "*Specification*" which attached what were described as "*Specifications and Standards Adhered to for the product*". There followed copies of two ISO certifications for Hitex; a certification that certain products (including facemasks) provided by Hitex complied with the applicable requirements of EU Directive 93/42/EEC; a test report from an organisation called "*Bureau Veritas*" setting out various tests to show that the face mask tested met standard EN 14683:2019; photographs of the masks and packaging.
156. It has been a point of dispute between the parties (although not a matter dealt with in the pleadings) whether the Supply Contract required the facemasks to include a nose bridge. Hitex has argued that the requirement was to meet the standard EN 14683:2019 and that that standard does not require a nose bridge. Uniserve (and Maxitrac and Dr Stead) argue that a nose bridge was part of the contractual specification.
157. I agree with Uniserve on this point. First, photographs of masks with nose bridges are included in the section of the Supply Contract headed "*Specification*". Secondly, the attached report from Bureau Veritas also includes such a photograph. Thirdly, whilst standard EN 14683:2019 does describe a nose bridge as being optional, it is a requirement of the standard that the mask must have a means by which it can be fitted closely over the nose, mouth and chin of the wearer, and it is difficult to see how masks of the type and shape being offered here could fit securely around the nose without a nose bridge.
158. I do accept, however, that the Claimants genuinely did not consider that a nose bridge was necessary up to the point that they entered into the Supply Contract, and that they were only informed of the requirement for a nose bridge shortly before the first delivery was due to be taken. Majlan had been asked to check that a nose bridge was present to work correctly and it was at the point of their inspection of the first delivery that the misunderstanding between the parties became clear.
159. There is a possible argument that Hitex was deliberately misleading Uniserve by producing the Bureau Veritas report if it intended to produce masks without nose bridges. Mr Khader explained that this was not the case. The purpose of the report was to demonstrate that the material and construction of masks met the relevant standard and that the reason why Bureau Veritas had been provided with a mask with a nose bridge was because the report was produced for special masks ordered from Azerbaijan where nose bridges had been specified and the test mask had been made especially for this. That contract, however, was not proceeded with.
160. I have some doubts about this explanation, especially as Hitex had produced a flyer for general circulation describing its mask product which included a description that it had a nose bridge (although I have not established when this was in circulation- it may date from the time when masks with nose bridges were being produced). Nevertheless, given that Hitex was purchasing from China machines that were capable of producing nose bridges, but initially did not set up the machines to do so, despite these doubts I conclude that on the balance of probabilities Hitex did consider a nose bridge to be optional and did not realise that the specification in the Supply Contract should be read as including a requirement for nose bridges.

## 9. THE FAILURE TO MEET THE FIRST DELIVERY DATES

161. It is clear that Hitex failed to meet the original delivery schedule, having missed making the deliveries due on 28 April and 5, 12, and 19 May 2020 and that this represented a breach of the Supply Agreement as originally agreed.
162. According to the evidence of Mr Khader, at the point that Hitex entered into the agreement it was confident it could meet the requirement for the first shipment as it had almost 6 million masks available at the point the Supply Contract was signed. However, two or three days before the first shipment was due, he was informed by Mr Alsakka that Uniserve required a product with nose bridges. The masks that had been already produced (or the vast majority of them) did not have nose bridges and therefore Mr Khader's confidence, although I am satisfied it was genuinely held at the time, proved to be misplaced.
163. Hitex agreed that masks with nose clips could be produced but not to the original timetable. Producing the nose bridges would require a minor modification to be made to the machines. Mr Khader explained to Mr Alsakka that it would take somewhere between 10 days and two weeks to recalibrate the machines to produce nose bridges. Mr Alsakka said that he would speak to Uniserve about a new timetable. He later came back to say that this would be acceptable, but that Hitex needed to start immediately implementing the change in the production.
164. Once the machines were retooled to allow for the insertion of nose bridges, there were further delays as it was found that production needed to be slowed as when running at the original pace the masks produced included an unacceptable rate of substandard masks.
165. By the middle of May Hitex was badly behind the original delivery schedule.

## 10. THE REVISED SCHEDULE

166. On 13 May Dr Stead produced in the course of a telephone call with Mr Khader, a document entitled "*Path to Optimum Output*" setting out the expected production of each machine over the coming days and weeks. Mr Popeck agreed the calculations and the document was presented to Mr Liddell.
167. Following a conversation with Mr Liddell, Dr Stead spoke again with Mr Khader around 22 May having set out in writing by email what is referred to as the "*Revised Schedule*". He asked Mr Khader to confirm that he could meet the delivery dates setting out a schedule for further deliveries totalling 79 million masks and asking:
- "As per our telephone call can you please confirm the agreed schedule for mask availability for this contract."
168. Mr Khader confirmed this in an email a few days later on 26 May 2020 saying:
- "... Kindly be noted that the schedule bellowed (sic) is agreed as discussed and according to the plan of receiving the new machines."

169. The Claimants' case is that Dr Stead had authority to agree a revised schedule with Hitex and that this exchange of emails with Mr Khader on 22 and 26 May had that effect.
170. Uniserve has essentially three responses to this:
- i) that the exchange did not create, and was not intended to create, a variation to the delivery dates agreed in the Supply Contract, but merely an agreed delivery programme which Hitex considered to be capable of being met being therefore a way forward (but only for as long as Uniserve wished this to continue) notwithstanding that existing and future breaches of the Supply Contract would continue to be actionable on the part of Uniserve;
  - ii) that Maxitrac/Dr Stead had no authority to agree a variation; and
  - iii) that the statement of timetable was not valid because it did not comply with the formalities for a variation.
171. I will address these points in turn.
- i) Was the exchange intended to create a variation to the contract?*
172. In their pleaded case, Maxitrac and Dr Stead appeared to accept that the exchanges with Mr Khader resulted in the Revised Schedule being agreed.
173. Dr Stead confirms in his witness statement that he considered that he had authority to agree a revised schedule. By that I consider that he could only mean that he had authority to bind Uniserve to an amendment to the timetable provided in the Supply Contract, since he would hardly need authority to ask Hitex to come up with a delivery schedule if that delivery schedule was not to have any contractual effect. Dr Stead states further that the Revised Schedule was agreed on 26 May.
174. Mr Campbell, in his opening skeleton argument, indicates that the position of Maxitrac and Dr Stead was neutral as to the legal effect of any agreement of the Revised Schedule, and that this was a debate between the Claimants and Uniserve.
175. In his oral evidence, I think for the first time, Dr Stead indicated that this exchange might have been something other than an agreed variation to the delivery dates in the Supply Contract and was instead merely intended to confirm that Hitex agreed that this was a schedule that they would be able to perform, rather than itself an agreement to vary the contract.
176. I need to be cautious about this evidence, however for two reasons. First, because elsewhere in his witness evidence Dr Stead said that he did not consider the matter of whether this was a variation at the time and secondly because at the beginning of Dr Stead's cross examination Mr Walsh reminded him that if Uniserve could escape liability, this would mean that Maxitrac and Dr Stead would have no liability either. Dr Stead is an intelligent man who would understand that, whilst it was in his interest to confirm that he/Maxitrac were acting with authority, it was also in his interest that the Revised Schedule should not be seen as having any contractual force.
177. Mr Campbell in his written and oral closing argument repeated the argument that Maxitrac was instructed by Mr Liddell to agree a revised delivery schedule. He

reaffirmed that his clients remained neutral on the question whether the result of the agreement with Mr Khader was to vary the Supply Contract or merely an agreed statement of a possible way forward.

178. In my view, as I explain further below, Dr Stead was specifically given actual authority to vary the contract. I consider further that his exchange with Mr Khader was intended to have this effect.
179. There are various indications that lead towards the conclusion that the Revised Schedule was intended to replace the schedule for delivery set out in the Supply Contract.
180. First, there was no need to agree a schedule of Hitex's prediction of what it expected its production capacity to be as this had already been agreed in the form of the "Path to Optimum Output".
181. Secondly, the reference in this exchange to an "agreed schedule" in itself provides some indication that this was meant to agree a new schedule to replace that previously agreed between the parties (as opposed to the earlier document that was merely described as a "Path to Optimum Output").
182. Thirdly, if the Revised Schedule was not intended to have any contractual force, then it is difficult to see why it needed to be agreed at all or why Dr Stead needed to be given authority to agree it.
183. Fourthly, further evidence that this was agreed is that both parties acted as if this would have contractual effect. Dr Stead sent the revised figures to Mr Chaplin for him to update his spreadsheet and the new figures were passed to Majlan as a guide to all future collections.
184. Finally, it is clear that both Dr Stead and Mr Liddell thought that this revised schedule had bound them. Only a few weeks later there is an email exchange between Mr Liddell and Dr Stead, where they were discussing abandoning the contract with Hitex in favour of a new Chinese supplier. Mr Liddell asks Dr Stead how they can get out of the Supply Contract. Dr Stead indicates that they should wait to see how Hitex get on in meeting the Revised Schedule. It is telling that neither of them raises the point that there is no need to do this as Hitex were still contractually obliged to meet the original schedule and by this time Hitex was hopelessly behind on delivering to that schedule.
185. Further, in the telephone conversation that I discuss in detail below between Dr Stead and Mr Khader on 17 June 2020, it is clear that Dr Stead treats the new schedule as having contractual effect. At one point he says:

"The contract actually state that you have a schedule, we agreed the new schedule."

186. Even if, contrary to my finding, the Revised Schedule was not agreed as a replacement for the original delivery schedule in the Supply Contract, then at the very least the email exchange on 22-26 May would have induced Mr Khader and Hitex to believe that the schedule was agreed as a contractual variation to the original schedule. I will discuss the consequences of this further below.

***i) Did Dr Stead/Maxitrac have authority to agree a variation?***

187. The authority of Maxitrac or Dr Stead to agree a variation to dates in the Supply Contract needs to be considered under a number of headings.

***(a) Was there general authority under the contracts with Uniserve?***

188. At the time that the Revised Schedule was agreed, the only written agreement between Dr Stead and Uniserve was that set out in the Initial Contract, which takes the form of an exchange of emails. Dr Stead drafted a form of email which he asked Mr Liddell to return. This request came in the form of an email on 29 March which he signed off:

"Andrew Stead  
Managing Director, Maxitrac Limited".

189. Mr Liddell duly returned this the same day around 20 minutes later.

190. The full text of this email is as follows:

"Andrew,

I agree to terms that you set out in our call today (12.30) and for the following:

- "i, That any information communicated to me regarding products or the supply of products in any medical capacity or category shall only be used for the purposes of demonstrating to NHS England that the products are suitable for supply.
- ii, That any information received will not be shared or passed to any other entity or person or contact either private or commercial without your express consent.
- iii, That Maxitrac Limited (Andrew Stead) is, and shall always remain the agent or source for any product or product price communicated on the specifications provided on the 29/3/20 and that no attempt will be made to approach any supplier or manufacturer named on any document supplied or discussed on this day, without express consent being given.
- iv, That any breach of the above terms grant either Maxitrac or Andrew Stead the ability to seek reparation in the UK courts.

Thanks  
Ian Liddell  
Group Managing Director  
Uniserve".

191. The question arises whether this agreement has any bearing on the question of authority being granted by Uniserve to Maxitrac and/or Dr Stead.

192. The major concern being addressed in this exchange of emails was to grant a kind of exclusivity to Maxitrac and to control the use that Uniserve may make of any

information provided by Maxitrac to Uniserve. However, relevant to the question of authority, are the words:

"Maxitrac Ltd (Andrew Stead) is, and shall always remain the agent or source for any product or product price communicated on the specifications provided on the 29/3/20".

193. The reference to the specifications provided must be taken as a reference to specifications attached to Mr Liddell's email of 29 March which attached specifications for gowns, surgical facemask, respirator masks and eye protection which, from the circumstances, appears to have formed part of a specification produced for the purposes of a Framework Agreement which was to be let by NHS Supply Chain.
194. Unfortunately, there is no recording or transcript of the telephone call referred to, but Dr Stead's evidence is that the discussion included a 50:50 profit share after agreed overheads and otherwise, insofar as the discussion dealt with the relationship between the parties, was captured in the terms set out in the email.
195. The arrangements between Maxitrac and Uniserve were (according to Mr Liddell) that Uniserve would receive an equal profit share of gross profits net of all costs (although transport costs were in fact the only costs). Dr Stead, in his witness statement, talks of "partnering" with Maxitrac, and also speaks of a 50-50 split after agreed overheads. As it appeared that Maxitrac and Uniserve were working together with a view to profit and were sharing profits and costs, I put to the parties the question whether Maxitrac and Uniserve were in fact in partnership together. Each of the parties agreed that it was not their case that there was any partnership, and I was later pointed to a provision in the (later) Maxitrac Contract which stated in terms that:

"Nothing in this Agreement shall be construed as creating a partnership or a contract of employment between the Parties".

196. As no party pleads that there was a partnership, and the contractual relations were not operated in a manner that one would expect in relation to a partnership, I will not consider this point any further.
197. Turning to witness evidence, Mr Liddell stated in his first witness statement that:

"Andrew Stead and I spoke and, on 29 March 2020, agreed during a telephone conversation to a series of terms to govern our relationship. One of those terms required Andrew Stead and Maxitrac Limited, being Andrew's company, to be the agent for and source of any PPE of which Andrew Stead gave me notice."

198. Mr Liddell was asked during his cross-examination whether Dr Stead was a middle-man putting a deal together or was his man, his agent, his representative? He answered:

"Yes, he was definitely more our agent, our representative. It wasn't just an introduction and then he had no more involvement. He was very much, you know, front and centre of managing that whole production and that relationship with the factory."

199. In response to a question whether it had occurred to Mr Liddell when there were discussions about the revised schedule to try and reserve Uniserve's right to terminate for previous late deliveries, Mr Liddell answered:

"the relationship was entirely managed by Mr Stead ..."

200. In his oral evidence Mr Liddell described Maxitrac's role as not just being introduction: but also included the management of suppliers and the expertise in PPE, although he later stated that Dr Stead had no authority to be a signatory on agreements or to vary contracts unless Uniserve had approved this, but that approval could be by email or by telephone.
201. Turning in more detail to Dr Stead's witness evidence, he confirms that all communications with suppliers until delivery were with him but:

"It was never agreed that Maxitrac would have any role or power to alter any legal rights but Uniserve might have in respect of any suppliers, such as the termination of any arrangements. That is not something Maxitrac would have agreed to... In the event that any decisions had to be made regarding arrangements with potential or existing suppliers, I would run these matters past Mr Liddell who was effectively the face of Uniserve, for his approval."

202. In cross-examination, Dr Stead agreed that he was an agent for Uniserve but agreed also that he did not use the word with any legal connotation. He also used the word "partnership" but again I think he was not meaning this word in the formal legal sense.
203. Putting all this evidence together, I think it is clear that Dr Stead and Mr Liddell both regarded Maxitrac (although Mr Liddell might also say Maxitrac and Dr Stead) as Uniserve's agent or representative in some sense. However, there was no understanding between them that Maxitrac was Uniserve's agent in the sense of a person with a general authority to create or alter legal relationships on behalf of Uniserve as a result of the relationship that they had created under the Initial Agreement.
204. Further evidence for this fact, is that neither Maxitrac nor De Stead are referenced in the Supply Contract (or the Commission Contract) as Uniserve's named authorised representative.
205. This is not to say, however, that the parties did not envisage that Maxitrac might on occasions specifically be given authority to vary a contract.

***(a) Was Dr Stead given specific authority?***

206. Dr Stead's evidence in his witness statement was that in a conversation with Mr Liddell on 17 May he discussed the revised schedule whose accuracy he had confirmed with Mr Khader. Mr Liddell told him that the DHSC had "*agreed to it but it's our last fucking chance to deliver on this one*". He then told Dr Stead to "*get on with it*". Dr Stead understood this to mean that he (Dr Stead) should liaise with Hitex to agree a revised delivery schedule for the masks and that he had been given authority to do so.
207. Mr Liddell in his witness statement agrees that he did tell Dr Stead to sort out the problems caused by Hitex failing to meet the contractual delivery dates but did not recall instructing him to negotiate or agree to vary the original delivery schedule. He

goes on to state that in any case he (Dr Stead) was not authorised to do so. He refers also to the context that Dr Stead was at the same time seeking to secure an alternative supply of facemasks from China.

208. Mr Liddell clearly has a poor memory of the conversation and I prefer Dr Stead's evidence on this point. I consider that it is more likely than not that the conversation recalled by Dr Stead did take place as he recalls and that that conversation gave, and was intended to give, Dr Stead authority to agree a new schedule for delivery.
209. In my view, Dr Stead was specifically given actual authority to vary the contract and did do so.

**(a) Did Dr Stead have implied actual authority or ostensible authority?**

210. Having found that Dr Stead did vary the contract and had specific authority to do so, I need not consider the questions of implied actual authority or ostensible authority, but for completeness I will do so.
211. Mr Lewis KC, on behalf of the Claimants, makes a point based on the pleadings that Uniserve admits that Maxitrac was its agent, even if it denies specifically that Maxitrac or Dr Stead any actual or ostensible authority to enter into or vary contracts including the Supply Contract. This is also Dr Stead's position on the matter.
212. This pleading is consistent with the witness evidence from Mr Liddell who, as we have seen, refers to Maxitrac as being its agent, but denies that Maxitrac or Dr Stead were imbued with any actual authority.
213. Much here turns on what is meant by an agent.
214. In his opening remarks, Mr Campbell took me to the definition of agency in Chapter 1, Article 1 of the well-known authority *Bowstead & Reynolds on Agency* (23<sup>rd</sup> edition) ("**Bowstead**"). The core (in my view, although Bowstead warns that the definition put forward needs to be viewed as a whole) of the definition put forward here is that agency is: "

"the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests sent that the other should act on his behalf so as to affect his legal relations with third parties".

215. This is the classic paradigm of an agency. It will generally be what a lawyer means when he describes someone who is being the agent of someone else. However, as is acknowledged in *Bowstead* (see the discussion at paragraph 1–002) agency is a "*relative notion there are many acceptable uses of the term which do not always coincide with each other*". In particular, lay usage of the words "agency" and "agent" may differ from the paradigm usage of the term by lawyers.

*I. Implied actual authority*

216. Generally, silence is incapable of giving rise to actual authority, unless there is further indication from the principal that they acquiesce to the agency. In *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("**Freeman and Lockyer**"), Diplock LJ (as he then was) said (at paragraph [50]):



"...to confer actual authority would have required not merely the silent acquiescence of the individual members of the Board, but the communication by words or conduct of their respective consents to one another...".

217. Actual authority will usually arise from an express grant of authority. However, it may also be implied from the circumstances. Where it is so implied, it is known as "implied actual authority". In *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549, ("**Hely-Hutchinson**") Lord Denning MR relied on *Freeman and Lockyer* and then went on to say:

"[Actual] authority may be express or implied.

It is *express* when it is given by express words, such as when a Board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the Board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it."

218. In the case before me there is an admitted appointment of Maxitrac as agent in some sense, but both Uniserve and Dr Stead agree that Maxitrac was a type of agent that in fact was not intended to have any general power to enter a contract or to vary contracts such as the Supply Contract. This is not the same as the appointment of managing director.
219. Implied actual authority may also occur without a person being appointed to a position such as that of a managing director which implies an authority to do things which fall within the usual scope of that office. It may occur where an agent enters into transactions as if he had been so appointed and the principal communicates its approval of the agent acting in this way. This type of implied authority derives from a course of conduct by the agent, which with full knowledge is approved by the principal. It was by this type of authority that the defendant company was bound in *Hely-Hutchinson* where a director had been acting with the knowledge and acquiescence of the board of his company as if he was a managing director and the circumstances were found to be sufficient to imply actual authority on the director concerned.
220. I do not think the current circumstances are sufficiently close to *Freeman & Lockyer* or *Hely-Hutchinson* for a similar finding to be reached in the case before me. Unlike the director in *Hely-Hutchinson*, Maxitrac/Dr Stead did not generally seek to exercise powers as an agent to make or vary contracts. He acted only once to vary the Supply Contract and did so on the basis of what he understood to be specific authority. There was no general course of conduct in which Uniserve could be said to have acquiesced as to have impliedly granted actual authority on a general basis.

## II. *Ostensible or apparent authority*

221. This then brings us to the question of ostensible or apparent authority.

222. It is clear that Uniserve and Maxitrac each agreed that Maxitrac (or Dr Stead) was an agent for Uniserve - albeit that they agreed that this was not an agency of the type that would allow the agent to bind the principal. Uniserve pleads that Maxitrac was its agent.
223. Uniserve argues that Maxitrac (or Dr Stead), even if it was acting as its representative or (in some sense) agent, it was not held out by Uniserve as being Uniserve's agent. If Hitex was considering Maxitrac to be Uniserve's agent, this was not as a result of any representation made by Uniserve. I find this point difficult to accept.
224. I accept Dr Stead's evidence that Mr Waller originally contacted Mr Liddell. Whilst I have not been taken to any such communication, it seems to me that it was more likely than not that there had been some communication (written or oral) between Mr Liddell and Mr Waller (or Mr Popeck) to the effect that Maxitrac or Dr Stead would be representing Uniserve in relation to the (then) proposed Supply Contract. It would have been intended that this communication should be communicated to the supplier that Mr Waller was canvassing (Hitex).
225. Even if this was not the case and Hitex, Mr Popeck and Mr Waller all consented to deal with Dr Stead on the basis of his say-so that he was representing Uniserve. Uniserve permitted Maxitrac to represent that it was Uniserve's representative. Uniserve also, in my view, represented through its conduct (in that Dr Stead was the only person, other than perhaps Majlan, that was speaking on behalf of Uniserve) that Dr Stead was its agent to negotiate and subsequently manage the contract in that Uniserve.
226. As Lord Denning says in *Hely-Hutchinson*:
- "Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation."
227. Lord Denning's example may be applied to our current facts, Uniserve was holding Maxitrac out as being its agent by allowing Maxitrac to represent it in relation to Hitex to the exclusion of any of its own directors or employees. As between Uniserve and Maxitrac there were clear limits on the authority that Maxitrac had, to the extent that Maxitrac had no authority to enter into any arrangements that would affect Uniserve's relations without express instructions. But Uniserve did not make that restriction known to Hitex. All Hitex knew was that Maxitrac was Uniserve's agent, and as such it was entitled to assume that Maxitrac had the full powers of an agent who was managing a contract on behalf of a principal.

228. In my view, therefore, even if Maxitrac (acting through Dr Stead) did not have actual authority to enter to agree the Revised Schedule, it would have had apparent authority in the eyes of Hitex.
229. The Claimants argue further that Uniserve knowingly acquiesced in the agreement of the Revised Schedule until it later found it convenient to dispute it. The Claimants argue that this anyway gives rise to an apparent or ostensible authority that operates as an estoppel and cite *Freeman & Lockyer* and *City Bank of Sydney v McLaughlin* 9 CLR 615. (1909).
230. The latter case is a 1909 case in the High Court of Australia. It related to a mortgage taken out under a power of attorney made by a property owner in favour of his wife. At the time the power of attorney was created the putative mortgagor was insane. After the attorney's husband had recovered his sanity, he accepted the benefits of the mortgage in the form of advances from the Bank made in reliance on the mortgage. The court accepted that a contract made by a "lunatic" (using the language of the time) was not void but may become binding upon him if by his subsequent conduct he precludes himself from denying its validity. Griffith CJ outlined a doctrine of equitable estoppel that arises from "*the mere fact of acceptance and retention of the benefit arising from the acts of the person assuming to act as agent*". This doctrine, in the opinion of the court extended to "*all cases of assumed agency in which the necessary conditions exist*". The ratio of the case was as follows:
- "In general a man is not bound actively to repudiate or disaffirm an act done in his name but without his authority. But this is not a universal rule. The circumstances may be such that a man is bound by all rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in a position of disadvantage, from which, if he speaks or acts at once, they can extricate themselves, but from which, after a lapse of time, they can no longer escape. Under such circumstances mere inaction is convincing evidence of ratification or adoption."
231. Whilst this is an old case, and not English authority, I think the reasoning is good.
232. This is similar, although not the same as, the point put forward by Maxitrac/Dr Stead's counsel, Mr Campbell, in his opening skeleton argument - that the revised schedules were reported to both Mr Chaplin and Mr Liddell of Uniserve and provoked no suggestion that Dr Stead had gone beyond his instructions and that:
- "The lack of objection from Uniserve confirms that Maxitrac was in fact authorised to agree the revision; alternatively, Uniserve ratified any exceeding of authority on the part of Maxitrac"... Uniserve ratified the revision not only through its lack of objection, but also its subsequent instructions to its local agent, Majlan, to collect shipments in accordance with the revised schedule."
233. Uniserve's lack of objection to the Revised Schedule can be seen either as evidence that Dr Stead's had specific actual authority; or as ratifying Dr Stead's act as its agent in entering into the Revised Schedule as a contract variation, and thereby adopting this as its own contract. Mr Walsh has invited me to take a pleading point that ratification was not specifically pleaded but I do not think I should do so as the whole question of

Maxitrac's authority was clearly in issue and the ratification argument is just one way in which the Claimants' case on this was always likely to develop.

234. Another way to consider this is that Uniserve is estopped from denying that the Supply Contract was varied by the Revised Schedule. In my view all the requirements of an estoppel are present: Uniserve, through its conduct, allowed Hitex to believe that Maxitrac was its agent and subsequently that the Revised Schedule had been agreed; Hitex, in continuing to expend money and effort in meeting the Supply Contract, was relying on the Revised Schedule as having been agreed; and Uniserve must have understood this.
235. This reflects the principle put forward by Denning LJ (as he then was) in *Charles Rickards v Oppenheim* [1950] 1 KB 616 at 623 (and quoted in *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46 ("*Nichimen*"), which is one of the cases that was cited to me. The principle was stated as follows:
- "if the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work he would accept it, and they did it, he could not afterward set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it."
236. The circumstances are also on all fours with the decision in *Levey & Co v Goldberg* [1922] 1 K.B. 688. mentioned in *Chitty* at 26-046. In this case the defendant agreed in writing to buy from the plaintiffs certain pieces of cloth over the value of £10216 to be delivered within a certain period. At the oral request of the defendant, the plaintiffs voluntarily withheld delivery during that period. The defendant subsequently refused to accept delivery, and, when sued, contended that the plaintiffs themselves were in breach, as the oral agreement was insufficient to vary the terms of a contract which was required by law to be evidenced by writing. It was held that although the forbearance by the plaintiffs at the request of the defendant did not constitute a variation there was a waiver, and the plaintiffs were entitled to maintain their action.
237. In conclusion on the question of authority, it is my finding that Maxitrac (acting through Dr Stead), even though it had no actual general authority to bind Uniserve, did have specific authority to agree the Revised Schedule and did do so. Even if it did not have that authority, Uniserve through its conduct, and perhaps also specifically, held out Maxitrac as being its agent, and as such clothed Maxitrac with the apparent authority to enter into such a variation. Furthermore, through its action in acting as if the variation was agreed, it must I think be taken as having ratified the variation and it would be estopped from resiling from that position.
238. A further consideration that is relevant to this issue is that there is a good argument that the agreement of the Revised Schedule was not actually a variation to the Supply Contract as such, but was in fact an adjustment to its operation that was envisaged within the terms of the Supply Contract. Clause 2.1 of the Terms and Conditions of the Supply Contract required delivery:

"in accordance with any delivery timescales, delivery dates and delivery instructions (to include, without limitation, as to delivery location and delivery times) set out in the Order form or a Purchase Order **or as otherwise agreed with Uniserve in writing**". (Emphasis added.)

239. It follows therefore, that the Supply Contract envisaged that there may be changes to the delivery timescales or delivery instructions that would be agreed in writing. It is perhaps a question of semantics as to whether such an agreement in writing should be regarded as a variation of the Supply Contract, or as operating a mechanism under the Supply Contract, but certainly, the fact that this was envisaged in this way suggests that variations to these matters were regarded under the Supply Contract as a matter of contract management and therefore was within the scope of Maxitrac which was, undeniably, undertaking contract management on behalf of Uniserve.
240. Under the Revised Schedule deliveries were due as is set out below. All such delivery dates were set for a Sunday. The date and day of the Ninth delivery was an exception and may have been a mistake as the due date was described as "Sunday 13 July" and 13 July was a Monday. I have added a column showing the cumulative total that would have been delivered according to the Revised Schedule:

<b>Date</b>	<b>Quantity (masks)</b>	<b>Cumulative total to be delivered</b>
31 May	1m	1m
7 June	1m	2m
14 June	2m	4m
21 June	3m	7m
28 June	5m	12m
5 July	5m	17m
12 July	7m	24m
13 July	7m	31m
20 July	8m	39m
27 July	8m	47m
3 August	8m	55m
10 August	8m	63m
17 August	8m	71m
24 August	8m	79m

241. It may be noted that 1 million masks had already been delivered prior to the agreement of the Revised Schedule (in two batches collected on 16 May and 20 May) and if this is added to the 79 million to be delivered under the schedule, the total would match the 80 million total required by the Supply Contract.
242. As the Revised Schedule deals with a total of 79 million masks I think it must be taken that the 1 million masks that had already been delivered prior to the agreement of the Revised Schedule cannot be counted towards delivery according to the Revised Schedule.

***i) Was there a failure to comply with the formalities for a contract variation?***

243. Uniserve's third argument against the Revised Schedule being binding on it is based on the provisions in the Supply Contract relating to formalities for amending the contract.
244. Clause 17.2 in the General Terms and Conditions within the Supply Contract states that any:
- "... variation to this Contract shall only be binding once it has been agreed in writing and signed by an authorised representative of both Parties."
245. Uniserve argues that this reference to an authorised representative refers to the parties identified in Box 9 of the Order Form which identifies Mr Liddell or in his absence Mr Chaplin as the "Uniserve Authorised Representative(s)" and Mr Alsakka or in his absence Mr Popeck as the "Supplier's Authorised Representative(s)".
246. The Claimants make three objections to this argument.
247. First the Claimants argue that this point was not pleaded. This point required delving into the history of the pleadings as they had developed. Uniserve, in its Response to Request for Further Information, had originally stated that the exchange of emails agreeing the Revised Schedule did not meet the requirements of clause 17.2 of the General Terms and Conditions because they were not:
- "signed by an authorised representative and Uniserve's authorised representatives were those mentioned in box 9 of the Order Form."
248. The Claimants later served an Amended Particulars of Claim replacing the paragraph of its original Particulars of Claim to which this paragraph of the Response was responding. Uniserve produced an Amended and Re-amended Defence, and the Claimants argue that this superseded or replaced the original response and contained no specific pleading as to the effect of clause 17.2. Neither was this point included in the agreed list of issues prepared for the Case Management Conference. The Claimants therefore look to treat the point as having been abandoned.
249. I am not going to make any finding based on this point. The point was clearly raised in Uniserve's skeleton argument and the Claimants have had plenty of time to deal with it. If Uniserve failed to repeat its response when it re-amended its Defence, I have no doubt that this was by oversight, and I will not deny Uniserve its opportunity to argue the point.
250. Secondly, the Claimants argue that this point is has already been determined by the judgment of Deputy Judge Wicks, and so should be regarded as *res judicata* and not reopened at trial.
251. It is necessary to consider what the learned judge determined on this point. The matter is dealt with at paragraphs [41] to [46] of her judgment. She analyses carefully the language of the contract and concludes that Uniserve had no real prospect of establishing that the exchange of emails was not a variation of the Supply Contract on the grounds that it did not involve those identified in boxes 9 and 10 of the Order Form.
252. This raises an interesting question about whether a finding in a judgment which had no bearing on the Order made (since the learned judge, despite this finding, went on to

dismiss the Claimants' application before her for summary judgment) could give rise to issue estoppel. The Claimants argue that the ingredients of the decision are:

- i) that it must be a decision of a court of competent jurisdiction;
- ii) it must be raised and controverted; and
- iii) it must be on their merits; and it must be final.

253. In aid of these propositions, Mr Lewis has referred me to *Eastwood and Holt v Studer* (1926) Com Cas 251 and *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners) The Sennar (No 2)* [1985] 1 WLR 490. Mr Lewis also referred me to *Jones v Lewis* [1919] 1 KB 328 and *Re Waring* [1948] All ER 257 as authority that issue estoppel may be based on law, fact or mixed fact and law including issues of construction.
254. Mr Walsh on the other hand argued that, as this finding was not one that supported Judge Wicks' decision (which was made on other grounds) and did not affect the Order that was made, it should be regarded as *obiter dicta* and should not give rise to an issue estoppel. He cited *National Life Insurance Co v Sun Life Assurance Co of Canada* [2005] 1 Lloyd's Rep 606 at [41] - [45].
255. For reasons I will explain, I am not obliged to choose between these two formulations, but, without seeking to make any final determination on this point, I prefer Mr Walsh's analysis.
256. The reason why I do not need to make a final determination on what seems to me to be quite an important point of law, on which there was very little opportunity for reasoned argument, is that I agree fully with the analysis put forward by Judge Wicks so there is no reason for any reliance on issue estoppel. Without repeating that analysis in full here, I agree that there is no reason to believe that the "authorised representative" mentioned (without capitals) in clause 17.2 of the Supply Contract should be limited to the individuals who were named as (with capitals) the "Uniserve Authorised Representative(s)" and as the "Supplier's Authorised Representative(s)".
257. This point is also impacted by the discussion at [238.] to [239.] above as to whether agreeing a revised delivery schedule should be regarded as a variation to the Supply Contract for these purposes, or merely the operation of a procedure for adjustment within the Supply Contract. If it was not in fact a variation, clause 17.2 would not apply to it.
258. In his closing arguments, Mr Walsh referred to the oral evidence provided by Mr Al Ghrabili that he expected to sign important contracts "with his pen". He had tried in cross examination to obtain a confession from Mr Al Ghrabili that the exchange of emails regarding the Revised Schedule could not be binding because he had not signed them, but I do not think he was successful in getting Mr Al Ghrabili to agree to this proposition.
259. I am not disposed to place much reliance on this evidence either way except that I do believe that Mr Al Ghrabili was being kept regularly updated by Mr Khader on all developments.

260. Mr Walsh had also questioned Mr Khader on his beliefs as to what was necessary to vary the contract. Mr Khader agreed that there was never any discussion about making an addendum to the Supply Contract and that any matter requiring contractual approval had to bear Mr Al Ghrabili's signature, but later stated that "by signature" he meant approval. He confirmed that he did have approval from Mr Al Ghrabili to agree to the schedule. He also stated that he believed that the exchange of emails did have the effect of varying the Supply Contract.
261. I have every respect for Mr Khader's honesty in how he gave his answers. There was a degree of inconsistency in his evidence, but I think this was born out of an (understandably) poor understanding of the legal issues that were being debated.
262. I have already given my finding that Maxitrac (as represented by Dr Stead) was authorised to represent Uniserve in relation to agreeing the Revised Schedule as a contractual variation. I consider that Mr Khader also should be regarded as an authorised representative of Hitex. He was a senior employee of Hitex in charge of production, and as such could be regarded as having authority to agree to necessary changes to a production schedule. According to his evidence, he was specifically authorised by Mr Al Ghrabili to send an email agreeing to the Revised Schedule.
263. Whilst it appears that neither he nor Mr Al Ghrabili were focused on the letter of the Supply Contract as regards variations of the contract, I consider that they would have regarded the Revised Schedule as replacing the schedule that agreed to work to.
264. I consider, therefore, that in sending this email Mr Khader was intending to bind Hitex to meeting the new schedule in replacement of the old schedule, and that he was doing so on the authority of Mr Al Ghrabili, who, as managing director, was in a position to authorise this.
265. Furthermore, even if he did not have that authority, it is clear that the variation was accepted by Hitex in that Hitex from then on worked on the basis agreed. If any ratification were needed of Mr Khader's action in agreeing the schedule, this may be thought to provide it. Certainly, it was enough to engage the point of principle enunciated by Denning LJ and set out above.

***ii) Conclusion in relation to the Revised Schedule***

266. Having regard to the evidence, and the discussion above, I consider that the parties did agree to substitute the Revised Schedule for the original delivery schedule in the Supply Contract. I consider that in agreeing to this and not specifically reserving rights to sue for prior breach, Uniserve must be regarded as having waived as breaches the preceding failures to meet the original contract.
267. Uniserve's defence will therefore depend on demonstrating that there was a breach by Hitex of its delivery obligations according to the Revised Schedule.

**11. WAS THERE A FAILURE TO MEET THE REVISED SCHEDULE?**

***i) What was required of Hitex following agreement of the Revised Schedule?***

268. Mr Walsh has referred me to the Court of Appeal decision in *Nichimen*. In addition to confirming the principle enunciated by Denning LJ set out above, this considered the position where, in a contract where time was of the essence in relation to a purchaser's



obligation to provide a letter of credit, the seller provided a fixed extension of time to meet this requirement, but the requirement was not met within that period. In response to an argument by the purchaser that the fixed extension of time was not of reasonable length, Kerr LJ, found that:

"if time was originally of the essence, then fixed extensions are mere indulgences to the extent that they are granted and have no other effect."

269. In applying that principle to the current case, it is necessary to view each of the revised dates and quantities in the Revised Schedule as constituting a limited and defined "indulgence" as regards quantities which should have been delivered earlier according to the original delivery schedule in the Supply Contract.
270. The result of this is that, whilst the original dates for delivery were amended or waived (contractually or by effectively by estoppel), the amended dates had to be met, and time remained of the essence in relation to these revised dates. If Hitex failed to meet the new delivery timetable, even by one day, then this would amount to a repudiatory breach of the Supply Contract which Uniserve would be entitled to accept so as to cause the termination of the Supply Contract.

***i) Uniserve's motivations to end the Supply Contract***

271. By 7 June 2020 Uniserve had entered into an alternative contract for the supply of masks with a Chinese company called BYD. This had been under discussion between Dr Stead and Mr Liddell for some time, certainly since 20 May when Dr Stead wrote to Lucy Hamlin, Mr Liddell's personal assistant, asking for approval of a contract with the BYD.
272. When, on 5 June, Mr Liddell had emailed Dr Stead asking how they could get out of the Hitex contract, this was, in my view, partially motivated by Uniserve's exasperation with Hitex' previous failures to supply on time, and partly motivated by the fact that it would pay much less under the contract with BYD than it was paying under the Supply Contract taken with the Commission Contract. From 7 June, Uniserve was highly motivated to terminate the contract with Hitex.

***i) Was there a failure to supply to the Revised Timetable?***

273. Uniserve alleges that there was indeed a failure to meet the Revised Schedule.
274. It is common ground that deliveries totalling 1 million masks were made on 16 May and 20 May and that a further delivery was available on 31 May.
275. The next delivery was due on 7 June, by which time a further 1 million masks were required to be delivered under the Revised Schedule. A further 1 million masks were available for shipment on that date, as confirmed by an inspection by Majlan.
276. A further delivery was due by 14 June of 2 million masks.
277. Uniserve pleads that Hitex failed to meet the requirement for a delivery on 14 June. It is necessary to consider the evidence for and against this proposition.

**(a) The evidence from Majlan**

278. As evidence for this Uniserve relies substantially on an email received by it from Mr Saja Al-Sharairi of Majlan on 14 June stating that Majlan had arranged with Hitex to pick up the "third shipment" of 1 million masks "*but now they call us and say that the shipment will not be ready by tomorrow*".
279. Mr Al-Sharairi further wrote on 15 June that it cannot estimate the production of the factory on a weekly basis and that it thought that there would be "*one million ready on this Wednesday* (which would have been 17 June) and "*another million on next week*".
280. The first of these emails amounts to hearsay and the second amounts to speculation. It is unknown as to how reliable Mr Al-Sharairi is as a conveyor of information. Hitex has put forward an unproved but credible account that Majlan was having difficulties in arranging airfreight during this period, and it is possible (but unproven) that Majlan may have had its own reasons for wanting to delay picking up masks.
281. No one from Majlan has been put forward as a witness and Hitex has asked the court to make adverse inferences from both the absence of any witness and any disclosure from Majlan, citing *Thomas Barnes & Sons plc v Blackburn* [2022] EWHC 2598 (TCC).
282. In that case, which involved a dispute about performance of, and termination of a contract, HHJ Stephen Davies sitting as a High Court judge identified three commonly encountered situations where someone who would be a useful witness is not called. He described these situations at paragraphs [31] to [34] of his judgment as follows,

"34. At one end of the spectrum is where a party has been unable to call a witness (or one who would give an open and honest account) for reasons outside its control, where it would plainly be wrong for the court to hold that against the party, whether by drawing an adverse inference against that party on a particular issue or by taking the absence of oral evidence from that witness into account more generally (e.g. by finding for the other party on an issue on the basis that there was no oral evidence to contradict what the witness called by the other had said). In such a case that party would need to adduce proof either that it had made reasonable efforts to trace and call the witness but had been reasonably unable to do so, or that the witness was so obviously hostile to that party that it would have been pointless even to try to do so.

33. The intermediate position is where, for reasons which have not been sufficiently explained or justified, a party has not called a witness who was involved in the events in question on that party's side. If the absence of such a witness means that the party is unable to adduce oral evidence in relation to one or more of the factual issues in the case, whereas the other party has adduced such evidence, then it seems to me that the court must make its decision only on the basis of the evidence before it, even if that means there is no evidence from that witness to take into account when deciding the factual issues in dispute, and can take into account the absence of evidence from any witness from that party.

34. At the other end of the spectrum is where the court is being invited to draw a positive adverse inference against that party in relation to a specific issue from its insufficiently explained or unjustified failure to call a crucial

witness to give evidence on that issue. As to that, the relevant principles and the recent authorities, including some observations by the Supreme Court, were comprehensively considered by HHJ Hodge QC (sitting as a High Court judge) in *Ahuja Investments v Victorygame* [2021] EWHC 2382 (Ch) at [23] - [25] and at [31] - [33]."

283. If I turn to the decision in *Ahuja Investments v Victorygame*, I see that HHJ Hodge QC there noted the conclusions of Brooke LJ (with the agreement of Roch and Aldous LJ) in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm). Brooke LJ noted that in certain circumstances, a court may be entitled to draw adverse inferences from the absence, or the silence, of a witness who might be expected to have material evidence to give on an issue in that action and that may go to strengthen the evidence adduced on that issue by the other party, or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. However, there must have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his or her absence or silence may be reduced or nullified.

284. HHJ Hodge QC noted further the observations of Cockerill J in *Magdeev v Tsvetkov* where she observed that:

"the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller."

and that

"This evidential 'rule' is a fairly narrow one. The drawing of such inferences is not something to be lightly undertaken."

285. HHJ Hodge QC added his own conclusions at [25] of *Ahuja Investments v Victorygame* as follows:

"In my judgment, before the discretion to draw an adverse inference or inferences can arise at all, the party inviting the court to exercise that discretion must first:

- (1) establish (a) that the counter-party might have called a particular person as a witness and (b) that that person had material evidence to give on that issue;
- (2) identify the particular inference which the court is invited to draw; and
- (3) explain why such inference is justified on the basis of other evidence that is before the court.

Where those pre-conditions are satisfied, a party who has failed to call a witness whom it might reasonably have called, and who clearly has material evidence to give, may have no good reason to complain if the court decides to exercise its discretion to draw appropriate adverse inferences from such failure."

286. The Claimants also cited *Royal Mail Group v Efofi* [2021] UKSC 33 at [41]. This was a case regarding unfair dismissal and largely turned on the question of who had the burden of proof under the relevant employment legislation, however there was also a question about whether any adverse inference should be drawn from the fact that in the employment tribunal Royal Mail did not adduce evidence for anyone who had been responsible for rejecting any of the claimant's job applications. Lord Leggatt JSC made comments about the approach that an employment tribunal should take in drawing an adverse inference from the fact that a relevant witness to a key point has not been called, but I do not think I can assume that these comments apply the same way to proceedings in the High Court.
287. Applying the principles enunciated in *Ahuja Investments v Victorygame* and *Thomas Barnes & Sons plc v Blackburn* to the case before me, it seems to me that:
- i) Evidence from Majlan was extremely important in this case as Majlan's email was one of the principal matters relied upon by Uniserve to establish a key element of its case.
  - ii) As far as I am aware, no explanation has been put forward as to why Majlan did not or could not appear as a witness. It would have material evidence to bring as Uniserve's case relies substantially on the 14 June email accurately recording information that had been received from Hitex by someone with the knowledge and authority to provide such information. This, in my view, brings the circumstances into the third category identified by HHJ Stephen Davies.
  - iii) The Claimants have explained the inference that they are asking the court to draw, which is that Majlan's email allegedly conveying information received from "the factory" was unsubstantiated or unreliable.
  - iv) The Claimants have provided other evidence that may tend to challenge the hearsay evidence given by the email of 14 June referred to above, in the form of Mr Khader's explanations and the so-called "Production Records".
288. Given the importance of the issue of whether the delivery due for 14 June was available on that date, and the absence of an explanation why no one from Majlan has been called to explain the circumstances leading to the statement in the 14 June email, I consider that I should draw an adverse inference from the failure to call a witness who could explain the basis on which the statement in that email was made, or to otherwise substantiate the source of that information.
289. With the exception of the recorded telephone conversation between Dr Stead and Mr Khader on 17 June, which I will discuss below, the only information that Uniserve had regarding what numbers of masks were ready for delivery on 14 June or at any later date came from Majlan. There is no suggestion that Dr Stead or Mr Liddell or Mr Bonnett had any other source of information.

290. In my view, an untested report that "*the factory*" (which could mean anyone from the receptionist to the Chief Executive Officer) said that stock would not be "*ready by tomorrow*" made by a shipping agent whose principal concern was to arrange conveyance was an inadequate basis for Uniserve to determine that the delivery date had not been met.
291. This is particularly so if one considers the provisions in the Supply Contract which set out the obligations of delivery and acceptance by the respective parties. These are set out in Clause 2 of the Terms and Conditions of the Supply Contract as follows:

"2.1 [Hitex] shall deliver the Goods in accordance with any delivery timescales, delivery dates and delivery instructions (to include, without limitation, as to delivery location and delivery times) set out in the Order form or a Purchase Order or as otherwise agreed with Uniserve in writing.

2.2 Delivery shall be completed when the Goods have been unloaded at [the Factory] and such delivery has been received by a duly authorised agent, employee or location representative of Uniserve. Uniserve shall procure that such a duly authorised agent, employee or location representative is at [the Factory] at the agreed delivery date and times in order to accept such delivery... Where Uniserve collect the Goods, collection is deemed delivery for the purposes of the [Supply] Contract."

292. These requirements on delivery, therefore, place requirement, first on Hitex as the supplier to have the goods available to be collected from its factory on the relevant date and secondly on Uniserve to collect the goods. Technically delivery is not completed according to the terms of the Supply Contract until Uniserve collects the Goods. It would be a nonsense, however, if Uniserve could put Hitex into breach by failing to perform its side of contract. Hitex's responsibility under the Supply Contract was limited to having the goods available for collection on (or by) the agreed dates (which should now be taken as those agreed in the Revised Schedule).
293. Given the duties on Uniserve to collect the goods, it is difficult to see how Uniserve could claim a breach by Hitex unless it had tried to collect the goods and had been unable to, or unless there was very cogent evidence that there was no point in seeking to collect the goods because they were not there. For the reasons stated above, I do not consider that the Majlan email of 15 June provided that cogent evidence.

***(a) The evidence from the telephone call of 17 June***

294. The further evidence that Uniserve relies on relates to a recording of a telephone call between Dr Stead and Mr Khader on 17 June 2020. That call is relied upon by Uniserve as evidence of Hitex's failure to meet the Revised Schedule.
295. As this call has become a linchpin of Uniserve's, case I will consider it in detail.
296. In doing so I will have regard to Dr Stead's tone during this call. His tone was at times verging on belligerent, sometimes cutting across what Mr Khader was saying. I consider that he was trying to use the call to obtain an admission from Mr Khader that Hitex was behind with deliveries. Mr Khader was polite, and naturally was not wishing to antagonise the representative of Hitex's most important customer, so that it cannot be assumed that his failure to correct Dr Stead at any point necessarily meant he was agreeing with what Dr Stead was saying, although, clearly, he was willing to disagree

with Dr Stead at points. As the conversation moved on Mr Khader could see the direction the conversation was taking and became alarmed.

297. This call was made, without warning, when Mr Khader was driving, and was conducted in his second language and so for those reasons also needs to be treated with some caution. Further caution is needed because it appears that the two parties to the call were speaking at cross purposes at many points.
298. The relevant elements of the call which may be construed as involving an admission by Mr Khader that the acquired number of masks were not ready on 14 June include the following exchanges:

*i) First putative admission*

Dr Stead asks, "*What is happening with the masks?*"

Mr Khader answers, "*Everything is okay now we are loading 1 million along with the shipping.*"

Dr Stead asks, "*Where is the other 2 million that were due on Sunday?*" Here he is referring to Sunday 14 June.

Mr Khader answers "*Erm ... they will pick up the other million on Sunday.*" Here he is referring to Sunday 21 June.

299. I think it is possible that here Dr Stead and Mr Khader were at cross purposes. It is likely that Mr Khader was focused on the arrangements for shipping he had discussed with Majlan, rather than production as such. Also, in referring to the "*other million*" I think it is possible that Mr Khader may have considered that the one million of masks already supplied prior to 31 May might have counted towards the delivery according to the Revised Schedule, although, if he did, for the reasons I have given at [242.], I do not think that he would have been correct in doing so.
300. Given the possible confusion, I am loathe to see this statement as an admission that Hitex was behind schedule, only that the outstanding 1 million masks that needed to be available by 14 June had not yet been picked up by Majlan.

*i) Second putative admission*

301. Dr Stead replies, "*No, no, no, no, on Sunday next week, there's 3 million due.*"

Mr Khader replies, "*Yes, yes, but we are arranging according to what they have space to give them because...*". This was not an admission that insufficient masks had been made at this point, but was an explanation as to why all the masks that were due by 14 Sunday had not been picked up (which, under the Supply Contract was Uniserve's obligation).

Dr Stead cuts in saying "*No, no, no, no I'm sorry, if you haven't made them then you have not met the schedule. You're not shipping to their specification, they're not the customer, they're a shipping agent. The contract actually states that you have a schedule, we agreed the new schedule.*"

Mr Khader agrees.

Dr Stead says, "*There were 2 million due on Sunday and you didn't deliver 2 million on Sunday. There is another 3 million due this Sunday and you're not going to do that either, you're not going to make it.*"

Mr Khader contradicts this saying, "*We are going to make it because, as you know, last Thursday when I called you we were just installing the two machines and we were already manufacturing with the other machines... But every time we have ...*"

302. This was a denial, rather than an admission, of the points that Dr Stead had made.

*iii) Third putative admission*

303. At this point Dr Stead cuts across him again and says "*You told me all about that... Ashraf, you told me on that call that this Sunday, as in Sunday that has gone now, you would deliver 2 million and you didn't.*"

Mr Khader responds, "*Yes, sir. Actually it's almost ready, but we are taking the guidance from the shipping so whatever they are asking ...*".

304. Uniserve takes this as an admission that the goods were not ready according to the Revised Schedule, but I think this is too much weight to place on this exchange.

305. It is not clear what Mr Khader meant by ready - he may still have been talking about completed delivery, (which would have required action by Majlan on behalf of Uniserve).

*i) Fourth putative admission*

Dr Stead replies, "*No, no sorry, no, no. You don't take your guidance from shipping.*"

Mr Khader agrees, saying, "*Yes, just hold on. Just hold on*" (I think at this point he was just dealing with traffic or with parking his car). "*I am taking the guidance according to our schedule, right?*".

Dr Stead goes on, "*Which guidance, according to our schedule? The schedule says 2 million on Sunday*".

Mr Khader says "*Yes – we supposed to give you 2 million this week, right?*"

Dr Stead contradicts him saying "*No, you were supposed to give me 2 million on Sunday?*"

Mr Khader asks, "*This week?*".

Dr Stead answers, "*No, Sunday, Sunday gone.*".

Mr Khader responds, "*Sir – just a second. When we agreed on the schedule last time, on 22<sup>nd</sup> May, we said that every Sunday we should have an inspection to ensure that the shipment is ready, and the delivery will be on Wednesday and the flight will be on Thursday. That's why we put all the schedule...*".

Dr Stead cuts him off saying *"No, no, no but that doesn't mean that you... It doesn't give you any kind of opportunity to not have them ready on a Sunday and you didn't have 2 million ready on Sunday just gone. And you didn't have 1 million ready on the Sunday before."*

Mr Khader does not contradict him but instead says *"But you know that we are installing the new machines and every time we have to..."*

We do not know what point Mr Khader was going to make, as again Dr Stead cuts him off saying *"It's not about... I'm sorry, with the best of respect, it's not about what I know, it's about what we agreed."*

Mr Khader says, *"Yes this is what we agreed!"*

306. I consider that Mr Khader and Dr Stead were at cross purposes. They both understood that the dates under the Revised Schedule were dates by which the goods needed to be ready for delivery. Dr Stead was focusing on that as constituting Hitex's obligation under the Supply Contract. Mr Khader, by contrast, was concentrating on the practicalities of actual delivery (which would only occur when Majlan, on behalf of Uniserve, collected the goods). This explains why Mr Khader was expecting "delivery" to occur in the week after 14 June.
307. I do not, therefore, consider that this exchange amounted to a clear admission by Mr Khader that Hitex was in breach of its requirements under the Revised Schedule.

ii) *Fifth putative admission*

Dr Stead next puts the following to Mr Khader, *"Last week on Thursday, you called me, and told me that you would not have 2 million ready on Sunday, that Sunday the 14th and there was not 2 million ready on Sunday you were still delivering..."*

Mr Khader does not deny this but instead says, *"Today we are 17, we are talking about two – three days' difference"*.

Dr Stead replies, *"And that matters. That makes a difference, that's a failure to supply."*

Mr Khader contradicts him saying *"Sir, this is not a failure of supply. You know the situation that we are installing the new machines. Every time when we connect a new machine..."*

Again, we do not know what point Mr Khader was about to make as he is once again interrupted by Dr Stead saying, *"Then why did you agree to the new schedule?"*

Mr Khader replies *"Because what I did understand from you, that every time, when we have a ready shipment on Sunday, maybe we will have one or two days..."*

Dr Stead cuts him off *"No, I never, ever, ever said that. No, I never ever said that. What I said was they'll be expected every Sunday and picked up on a Monday. That's what I said. I didn't..."*



This time it is Mr Khader who interrupts Dr Stead saying "*Wednesday*".

Dr Stead disagrees saying "*No I did not. I've got a recording of the call, Ashraf, I record all my calls.*" The latter two statements were untrue. Dr Stead did not have a recording of his previous conversation with Mr Khader, and it seems a large proportion of the calls he made relating to the Supply Contract were not recorded.

308. Whilst it may be a natural reading of this exchange that Mr Khader was accepting that there were not 2 million masks ready for inspection on 14 June, this is certainly not a clear statement to that effect.

309. It is likely that the parties were once again at cross purposes, that Mr Khader thought that Dr Stead was insisting on delivery (i.e. including collection) by 14 June, and was seeking to explain to him that there had been an understanding that although the dates in the Revised Schedule were dates on which the required numbers of masks needed to be ready, there was a mutual understanding that Majlan would not collect the masks until a few days and therefore delivery would not take place until that date.

*iii) Sixth putative admission*

310. The next exchange was in a similar vein.

Mr Khader says "*Sir, Sir, just calm down, calm down and listen to me.*". This was necessary as by this time Dr Stead speaking in an angry tone. He went on, "*When we agreed on the schedule, you said that the readiness or the availability of the stock will be every Sunday, right?*"

Dr Stead agrees, "*Yes.*".

Mr Khader carries on, "*and the pickup, we agreed from the beginning, that will be arranged by the shipping... Right?*".

Dr Stead, replies, "*But you didn't have the masks ready.*"

Mr Khader replies, "*Sir, it's almost ready.*".

Dr Stead develop his point, "*But it's not ready is it – it wasn't ready on Sunday. It's now Wednesday.*".

Mr Khader says "*Okay*".

311. Again, it may be a natural reading of this conversation that Mr Khader is agreeing that "it" was not ready on Sunday (14 June) but this is by no means a clear confirmation of the point. In this sort of conversation, saying "okay" may not connote agreement with a proposition just made, but may merely connote that the other speaker is it being invited to go on.

312. It appears from the exchange that followed that Mr Khader did not consider that he was confirming that there had been a breach of the Revised Schedule by Hitex.

313. Dr Stead next states "*The inspection is supposed to ensure that you have the correct quantity of masks available to the schedule.*"

Mr Khader responds "*Okay and who says that we don't have the correct quantity?*"

Dr Stead replies, "*Well, two people, first the shipping agent and secondly you just did. Because you just said to me that they will be ready today, or tomorrow.*"

Mr Khader asks, "*Who is the second one?*"

Dr Stead replies, "*You! You just told me on the phone right now that you were not ready. You've just told me on the phone just now that the masks that you were supposed to deliver on Sunday aren't going to be ready until today or tomorrow!*"

Mr Khader contradicts this saying "*It's ready now, we are loading now... The... "*

314. There followed a discussion of what was being loaded and the dates for this.

Dr Stead said "*You're loading 600,000 aren't you?*"

Mr Khader denies this saying, "*No – who told you this one? Who gave you this number? We agreed from the beginning...*"

Dr Stead replies "*Well then you tell me, how many are you loading today?*"

Mr Khader replies "*1 million now we are loading.*"

Mr Khader goes on "*You agreed from the beginning that you don't have to receive partial shipments of the 1 million, we have to give you millions – 1 million, 2 million, 3 million, 5 million, this is what we agreed right?*"

Dr Stead agrees "*Yes, and the dates were on that schedule.*"

Mr Khader responds "*May I know, just can you calm down and explained to me who gave you that number 600,000. Because I need to know who is giving you fake information.*"

315. It appears that even at this early date, Mr Khader was pouring doubt on the information that Uniserve was receiving from Majlan.

vii) *Seventh putative admission*

316. There followed a discussion of how many units Hitex had delivered to the shipping agent. This discussion also seemed confused as Dr Stead seemed to be conflating delivery (i.e. collection by the shipping agent) with Hitex's obligation to have numbers of masks available on particular dates according to the Revised Schedule. Mr Khader reminds Dr Stead that the contract is ex-works and that Hitex is not responsible for shipping.

317. Dr Stead clarifies that "*What I'm saying to you is that you have not manufactured 2 million masks to be ready to deliver by Sunday 14<sup>th</sup>. You have not made that date.*"

318. Mr Khader denies this saying "*Sir, it's ready.*"

319. Dr Stead goes on to clarify his proposition that 2 million units had not been manufactured so as to be ready for inspection on 14 June.

320. According to the transcript, Mr Khader answers "*Okay, the manufacturing is 2 million, we are almost done with the 2 million now we are delivering 1 million. They will take the other one million on Sunday, and we supposed to give another 3 million next week, right?*"

Having listened again to the recording I think this is better transcribed as follows: "*Okay, the manufacturing is 2 million. We are almost done with the 2 million. Now we are delivering 1 million. They will take the other one million on Sunday, and we supposed to give another 3 million next week, right?*"

321. Dr Stead reminds Mr Khader that they were speaking on 17 June and that the 2 million were due to be manufactured and completed ready to pick up on 14 June.
322. Mr Khader replies, "*On the 14<sup>th</sup>, yes but we have a partial stop from Thursday when we got the new lines because every time we... You don't want to listen to me to explain it for you.*"
323. This exchange is ambiguous. Mr Khader's answer at [320.] could, especially as originally transcribed, be construed as an acceptance that 2 million masks had not been manufactured on 14 June. However, as I have transcribed it, that is still a possible interpretation, but there is another interpretation that the first sentence confirms that the manufacturing of 2 million masks has been done and then goes on to explain what is being done about the delivery of these masks.

*i) Eighth putative admission*

324. As part of a longish speech when Dr Stead suggests that the UK government is holding Hitex in breach, Dr Stead suggests that the UK government would hold Hitex in breach "*and the reasons they gave were you didn't deliver... Have 1 million ready on the seventh and you didn't have 2 million ready on the 14<sup>th</sup>. Which is clearly in the schedule.*". It was, at best, disingenuous for Dr Stead to suggest this. There is no evidence that the UK government was bringing about an action for breach of contract. The evidence is that Mr Liddell had agreed other arrangements with DHSC.
325. A somewhat bewildering exchange follows:

Mr Khader asks, "*Why were we not ready for the 1 million on seventh? Here, it's in the car is going to the airport.*"

Dr Stead responds, "*No, that's 1 million.*".

Mr Khader asks, "*Now, can you tell me, how many million you received until now?*"

Dr Stead, replies "*I haven't looked. I have got one, two maybe three.*".

Mr Khader presses: "*Maybe three? And today is the third?*"

Dr Stead responds, "*No, today is the third on the schedule, before we agreed the schedule we did have 1 million masks. So today, on Sunday the 14<sup>th</sup>.*"

Mr Khader queries, "*So on the schedule on, 5 millions right?*".

Dr Stead answers, "*That's correct, on Sunday 14<sup>th</sup> it should have been 5 million.*".

Mr Khader sums up, *"Yes, so today you are getting the fourth and they will pick up next Sunday the fifth. So we have a difference of that next week we supposed to delivery 3 millions."*

Dr Stead objects, *"Ashraf, Ashraf, just stop right there. You just said to me that they're picking up a million now, which makes 4, and the other million to make 5, will be next week."*

Mr Khader responds, *"No, no, no, no, by the schedule, until the 14<sup>th</sup>, we supposed to deliver 5 millions right?"*

Dr Stead agrees.

Mr Khader goes on, *"Right, so today is 17<sup>th</sup>, we are giving the fourth million, the difference will be that they will take it next week, and we have a difference of 3 millions that should be delivered on the 21<sup>st</sup>. Right?"*

Dr Stead replies *"But you... No forget about the 21<sup>st</sup>, yeah what about the 14<sup>th</sup> you didn't have the 2 million ready on the 14<sup>th</sup>. It's gonna be a week late for the second million of the 2 million."*

Mr Khader answers *"Only correct the difference, I'm not..."*

Mr Khader is interrupted before he can finish his sentence.

326. I find this conversation extremely difficult to follow. As with earlier parts of the telephone call there is a mixing up between dates on which the production needs to be ready and delivery dates.

*i) Summary of the evidence of breach from the call*

327. In summary, in my view Dr Stead was clearly trying to get Mr Khader to admit a failure to meet the Revised Schedule, he had in effect ambushed Mr Khader and continually pressed him in a hectoring tone for an admission. Despite this he obtained nothing that can be relied upon as a clear admission of a breach of the Revised Schedule by Hitex as at the date of that call. During the call Mr Khader denied several times that there had been a breach. There were various points which might be taken as an admission by Mr Khader that 2 million masks were not available on 14 June, but none of these were clear, and I must take account of the fact that Mr Khader was on the back foot without having all the evidence in front of him. The parties clearly were at times at cross purposes as to whether they were discussing manufacturing or collection. Against this background, I do not think I can place much if any reliance on the conversation as evidencing that a breach had occurred by the date of the call.

***(a) The evidence from the Production Reports and Delivery Notes***

328. The Claimants argue that there was no breach of the Revised Schedule and put forward the Production Records as evidence of this. In particular:

- i) the Production Report for 7 June shows 2,356,850 masks being available at the end of the day;
- ii) the Production Report for 14 June shows 3,785,350 masks being available at the end of the day;

- iii) the Production Report for 16 June shows 3,785,350 masks being available at the end of the day;
329. The position is complicated by the fact that Majlan did not pick up the masks that were due for delivery on the dates on which they were due.
330. By 31 May Hitex had manufactured and delivered 1 million masks (this is not disputed) and also had a further shipment of at least 1 million masks (referred to by the parties as the "Second Shipment") ready for inspection. Majlan did not book cargo space for this shipment until 9 June 2020 and collected it only on 10 June, three days after the due date for delivery of the so-called "Third Shipment" (the 1 million mask shipment due on 7 June).
331. On 7 June, instead of collecting the Third Shipment, Majlan emailed Hitex informing that they had a flight to Heathrow on 15 June and asking for confirmation that they could pick up 1 million masks on 14 June. They wanted that confirmation before they would book any space on the flight. Hitex confirmed that the requested quantity would be ready. On 10 June Majlan reverted to confirm that they would take the third shipment on 14 June. There is no other correspondence between Hitex and Majlan before Majlan sent their email to Uniserve of 14 June stating that the 14 June shipment would not be ready.
332. In his phone call of 17 June with Mr Khader, Dr Stead made the point that Majlan had no authority to vary the Supply Contract, and therefore the notification that they would be picking up deliveries late did not excuse Hitex from its obligations to have stock ready by the dates provided for in the Revised Schedule. This is an unattractive argument, but I think it is a correct one.
333. In order to establish whether Hitex was in fact falling behind the numbers that it was due to provide under the Revised Schedule, it is necessary to take the figures available in the warehouse together with the numbers already delivered. It is not disputed that by 18 May 1 million masks had been delivered. A delivery note for 10 June 2020 (countersigned on behalf of Majlan) confirms that 1 million masks were delivered on that date.
334. I have set out in the table below a comparison between (i) the masks available in the warehouse for delivery according to the Production Reports and already delivered and (ii) the cumulative requirements for delivery according to the Revised Schedule.

<b>Date</b>	<b>(a) In warehouse</b>	<b>(b) Already delivered prior to date*</b>	<b>(c) Total of figures in columns (a) and (b)</b>	<b>(d) Cumulative total required by the Revised Schedule (RS)</b>	<b>(e) Due on/by date according to the RS</b>
31 May	13,069,300	-	13,069,300	1,000,000	1,000,000
7 June	2,356,850	-	2,356,850	2,000,000	1,000,000
14 June	3,785,350	1,000,000	4,785,350	4,000,000	2,000,000

*\*Excludes the 1 million masks delivered prior to 31 May for the reason given at [242.] above*

335. If the Production Reports are to be believed, it may be seen:

- i) by comparing columns (a) and (e) that Hitex had available in its warehouse on each of the dates 31 May, 7 June, and 14 June at least the amounts due according to the Revised Schedule for delivery on that date; and
- ii) by comparing columns (c) and (d) that, taking account of the amounts available in the warehouse and amounts previously delivered, there was no point when Hitex was falling behind its cumulative obligations to deliver according to the Revised Schedule.

336. Mr Walsh has invited me to place little reliance on the Production Reports citing the following points:

- i) The Claimants' unexplained non-production of the manual reports maintained by the machine operators, which would have provided more direct evidence of what had been produced.

This does not seem to me to be a point that reduces the probative value of the Production Reports themselves.

- ii) The fact that the numbers in the Production Reports had been compiled manually rather than by some automated process.

This again, does not of itself demonstrate any falsity in the Production Reports. To the extent that there may have been any inaccuracy in manual counting, it is unlikely that this would have been on a scale that was material to the points that are in dispute.

- iii) That the numbers in the Production Reports did not record what had been produced at the time, instead they recorded what was entered into the system, and in turn that depended on what had been transferred to the main warehouse.

If anything, I see this as a point in favour of the Claimants since it was possible that more masks were ready for delivery within the factory over and above those shown in the Production Reports.

- iv) That the Production Reports made no allowance for masks which may have been sold forward otherwise than to Uniserve, or which may have been needed to meet legal requirements in Jordan to supply customers in Jordan.

If there had been an occasion when Uniserve had turned up to collect masks and masks that were in the warehouse were unavailable for one of these reasons, then there might be something to this point. However, without having tested this point in that way, Uniserve cannot demonstrate that masks that were shown as available in the Production Reports were not in fact available to it. Hitex might have dealt with the requirements of other customers and of the Government of Jordan out of the reduction in the number of masks in the warehouse that we see in the table above between 31 May and 7 June. Hitex anyway might have preferred to let down other customers rather than its biggest customer, Uniserve. If Uniserve's case is that Hitex could never have met the contract because its stock was being requisitioned by the Government of Jordan, it has not done enough to establish that case.

- v) A report commissioned from auditors Crowe, that was claimed by Mr Al-Ghrabili to evidence the accuracy of the Production Reports, did not in fact do this as it was merely a desktop exercise some years later.

This does not seem to me of itself to cast any doubt on the accuracy of the Production Reports, but merely reflects a point that Hitex may have over-claimed the comfort that can be obtained from the Crowe report. If anything, the report does nevertheless provide some comfort on the accuracy of the production reports as it showed that the reports matched the inventory balance reported in the 2020 financial statements for Hitex.

- vi) Uniserve produced a news report dated 31 December 2020 which appeared to state that Hitex had reached a production capital of 500,000 masks per day "today".

I place no reliance on this report as I accept Mr Khader's explanation that the word "today" was mistranslation and was derived from a TV news report that had been filmed earlier and was one of several such reports. Certainly, it is too flimsy a basis to contradict the contemporaneous and internally consistent evidence of the Production Reports.

337. Mr Walsh also made a point concerning the sale of 6.5 million masks recorded as being sold on 1 June 2020. He noted that Mr Khader's was unable to recall who those masks were sold to in any more detail beyond being able to say that they were sold on the local market and, possibly except for some masks that were supplied to Uniserve, comprised masks that did not include the nose clips. I could not understand on what basis this evidence could be seen as discrediting the Production Reports.
338. I do not find any of these points persuasive as to why I should not regard the Production Reports as probative of the numbers of masks in Hitex's warehouse. They are contemporary documents that were produced for a proper commercial purpose and there is no evidence that they have been tampered with.

***(a) Conclusion as to breach of the Revised Schedule***

339. The evidence that Hitex was failing to meet the Revised Schedule is extremely weak. It amounts to hearsay evidence from a person that could have been called and was not called together with conclusions drawn from an unofficial recording of a confused and confusing telephone call between Dr Stead and an unprepared Mr Khader where Mr Khader was clearly attempting to obtain a clear admission of failure to meet the Revised Schedule but fell short of achieving that.
340. The evidence that the Revised Schedule was being met derives from Production Records that appear to be contemporaneous, and which have not been shown to have been falsified. Whilst the Production Records may have understated stock, as they took no account of stock that have not been moved into the main warehouse, and whilst they took no account of any stock that might need to be reserved to meet the requirements of another party, they remain the best records available.
341. If Hitex was in breach of its obligations to have stock available under the Revised Schedule, Uniserve could have found that out by meeting its own obligations under the Supply Agreement to take the goods on the due date for delivery. If Uniserve was unable to take the goods as a result of constraints on transport, it could at least have

sent a representative to check that the goods were available. If it wanted to rely on the goods not being available in order to terminate the Supply Contract, once it suited it to do so, it should have done this. In the absence of it doing so it cannot be surprised that the court will prefer the Claimants' documentary records to the far less solid grounds it has provided for believing that there was a problem.

342. I find, therefore, that Uniserve had no grounds for terminating the Supply Contract.
343. There has been much discussion of how and whether Uniserve effectively terminated the contract. Against the background of my finding that Uniserve was not entitled to terminate the contract, then the only matter to consider is what is the point at which *Uniserve* became in breach by wrongfully treating the contract as at an end, and what are the consequences of this.
344. Arguably Uniserve was first in breach at the point that it failed to collect on time the shipment that was due on 7 June. If this was a breach, however, it was not a repudiatory breach. Whilst time was of the essence in relation to Hitex's performance, it was not in relation to Uniserve's performance. It would have taken a notice from Hitex that performance was required by a particular date, to elevate this breach into one entitling Hitex to terminate of the Supply Contract.
345. The best view is that Uniserve evinced a renunciation of the Supply Contract around about 17 June when Dr Stead communicated to Mr Popeck that the contract was over. At about that date, or shortly afterwards, Majlan was instructed to have no further dealings with Hitex, and the Claimants would have concluded at that point that Uniserve had no intention of further performing the Supply Contract or the Commission Contract. In legal terms this amounted to an anticipatory breach. It was clear that Uniserve would not perform its obligations to accept delivery of masks and/or to pay for them in accordance with the Supply Contract. These obligations went to the core of those contracts and must be regarded as conditions of the Supply Contract so that this anticipatory breach would give rise to a right to Hitex to terminate the Supply Contract.

## 12. WAS THERE A TERMINATION OF THE SUPPLY CONTRACT?

346. Uniserve's case is that it terminated the Supply Contract either in accordance with the Supply Contract or by common law, having accepted Hitex's alleged repudiatory breach in failing to deliver on time, in a contract where time of delivery was of the essence and was clearly expressed to be a breach that was incapable of remedy.
347. I have already found that after the agreement of the Revised Schedule, the time for delivery should be that set out in the Revised Schedule and that Uniserve has failed to establish any breach of delivery under the Revised Schedule. It is unnecessary, therefore, for me to consider whether the communications that Uniserve rely on as demonstrating an effective termination by Uniserve for breach by Hitex, did in fact have that effect, as they could not have had that effect in the absence of a breach by Hitex.
348. However, for completeness, I will say that, if Hitex had been in breach of its delivery obligations, the communications relied on by Uniserve could not be regarded as



termination in accordance with the Supply Contract. Clause 12 of Schedule 2 of the Supply Contract provides as follows:

"12.1 this Contract shall commence on the Commencement Date and, unless terminated earlier in accordance with the terms of this Contract or the general law, shall continue until the end of the Term...

12.4 Either Party may terminate this Contract by issuing a Termination Notice to the other Party or of such other Party commits a material breach of any of the terms of this Contract which is:

(i) not capable of remedy...

349. A Termination Notice is defined in Clause 1 of Schedule 3 to the Supply Contract as

"... A written notice of termination given by one Party to the other notifying the Party receiving notice of the intention of the Party giving notice of its intention to terminate this Contract on a specified date and setting out the grounds for termination."

350. Clause 22 of Schedule 2 governs service of a Termination Notice:

"any notice required to be given by either Party under this Contract shall be in writing quoting the date of the Contract and shall be sent... By email to the person referred to in the Key Provisions..."

351. The address for notices for Hitex given in the Key Provisions is Mr Alsakka either at the factory address (for physical mail) or at his email address.

352. Uniserve claims in its Re-Amended Defence that it effected termination:

"through its agent Dr Andrew Stead by 19<sup>th</sup> June 2020, alternatively 11<sup>th</sup> July 2020 at the latest."

353. The communications relied upon as providing a written Termination Notice are two emails sent by Dr Stead to Mr Khader on 11 July 2020. These emails did not purport to be a Termination Notice and very clearly did not meet the requirements for a Termination Notice set out in the Supply Contract they were not addressed to Mr Alsakka (although the second one was copied to him). They were not sent to the correct address provided for by the notices provision (although the second one was copied to Mr Alsakka's email address). They did not quote the date of the Supply Contract. They did not set out an intention to terminate with a specified date. Instead, they referred back to the telephone conversations that Dr Stead had had with Mr Khader and Mr Popeck.

354. It is clear that these communications could not be a Termination Notice under the Supply Contract.

355. Uniserve relies alternatively on the proposition that there was a termination at common law through the acceptance of Hitex's repudiatory breaches as terminating the contract. In this case there is no specific form of notice that must be used. Uniserve relies on telephone conversations with Mr Khader and with Mr Popeck on 17 July as well as the two emails on 11 July as communicating that acceptance.

356. The requirements for notice in this case have been explained in the House of Lords case of *Vitol SA v Norelf Ltd (The Santa Clara)*, [1996] A.C. 800 ("*Vitol*"). This case concerned itself with a single substantive issue: whether an aggrieved party can ever as a matter of law accept a repudiation of the contract merely by himself failing to perform the contract.

357. At first instance (following an arbitration), Phillips J concluded that:

"It depends upon the circumstances. Failure to progress and arbitration is a good example of inertia that is likely to be equivocal. But in other types of contractual relationship where the parties are bound to perform specific acts in relation to one another a failure to perform an act which a party is obliged to perform if the contractor remains alive may be very significant. It is not difficult to envisage circumstances in which, if such conduct follows a renunciation, the obvious inference will be that the innocent party is responding to the repudiation by treating the contract at an end."

358. At the Court of Appeal, the court took a different view. Nourse L.J., delivering the judgment of the court, concluded that a mere failure to perform contractual obligations is always equivocal and can never in law constitute acceptance of an anticipatory repudiation by the other party.

359. In the House of Lords Lord Steyn's speech provided the judgment of their Lordships and restated what he understood to be establish principles:

"For present purposes I would accept as established law the following propositions. (1) Where a party has repudiated a contract the aggrieved party has an election to accept the repudiation or to affirm the contract: *Fercometal S.A.R.L. v. Mediterranean Shipping Co. S.A.* [1989] A.C. 788 . (2) An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end. (3) It is rightly conceded by counsel for the buyers that the aggrieved party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention, e.g. notification by an unauthorised broker or other intermediary may be sufficient".

360. Lord Steyn went on to set out his agreement with the judgement of Phillips J which he found "entirely convincing" saying:

"One cannot generalise on the point. It all depends on the particular contractual relationship and the particular circumstances of the case. But, like Phillips J., I am satisfied that a failure to perform may sometimes signify to a repudiating party an election by the aggrieved party to treat the contract as at an end."

361. Hitex argues that there was no communication that was sufficiently clear to amount to a clear and unequivocal acceptance by Uniserve of a repudiatory breach, and it makes points based on the authority of Dr Stead to effect a termination. I disagree. Probably

on 17 June, but certainly by 11 July, Hitex would have been (and I think it is established by internal emails was) in no doubt that Uniserve was purporting to treat the Supply Contract as being at an end as a result of Hitex's alleged failure to make timely supplies. It is clear from *Vitol* that that would be enough for the acceptance of the repudiatory breach - had there been one.

362. However, there was no such repudiatory breach. Accordingly, Uniserve's communication of a purported acceptance of that breach did not have the effect of accepting a breach. Instead, it must be regarded as an anticipatory breach on the part of Uniserve. Through these calls and emails, and through its ensuing action in cutting off communication with Hitex and instructing Majlan not to collect any further orders, Uniserve made it clear that it was renouncing and refusing to honour its obligations under the Supply Contract and no longer intended to be bound by its provisions. This renunciation amounted to an anticipatory breach by Uniserve.

### 13. WAS THERE A TERMINATION BY HITEX?

363. This anticipatory breach by Uniserve entitled Hitex to accept this breach as terminating the Supply Contract or to affirm the Supply Contract. Hitex did not expressly in writing or in oral communication tell Uniserve whether it was accepting that the contract was at an end or whether it was affirming the contract.
364. It is necessary, therefore, to consider its conduct in determining what was the consequence of Uniserve's renunciation of the Supply Contract
365. Hitex's case is that Hitex did not accept Uniserve's renunciation of the contract and continued to perform the contract.
366. Mr Lewis and Mr Knight argue that Hitex kept a sufficient quantity of goods to meet each delivery as it fell due and therefore was meeting its requirements under the Supply Agreement. They argue that Uniserve's failure to collect is to be taken as an implied request by Uniserve to postpone delivery of the goods by instalment. Their argument is that as no period of instalment was stipulated, Uniserve could have given notice to Hitex fixing a reasonable time thereafter within which the goods were to be delivered or accepted, but Hitex could not be compelled to deliver at one time the whole quantity of the goods which, but for the postponement, should have been delivered in the period of postponement.
367. This argument, in my view is unrealistic and is at odds with the proper interpretation of the Supply Contract.
368. Mr Lewis referred me to *Benjamin on Sale of Goods* (12<sup>th</sup> edition) ("**Benjamin**") at paragraphs 8-061 onwards. This describes a distinction that is made between different ways in which a contract for the supply of goods by instalments may be interpreted. In some cases, a contract may be regarded as an entire and indivisible contract for the delivery of the quantity of goods stated in it. In other cases (said to be more often) contracts for the delivery of goods by instalments will more often be construed as severable (or divisible) contracts than as entire. Here, performance by each party of his obligations may be severable, in the sense that a breach relating to one or more instalments must be considered in the light of its effect on the contract as a whole, so

that the innocent party will not necessarily be entitled to treat the whole contract as repudiated by such a breach.

369. This point is dealt with also in *Benjamin* at 9-010. The Sale of Goods Act 1979 s.31(2) provides:

"Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

370. The section is clear: whether or not a single failure of Hitex to deliver, or of Uniserve to accept a delivery repudiates the whole contract or is just a severable breach is a matter of interpretation of the contract and of the circumstances of the case.

371. As noted in *Benjamin* at 8-065, this section deals only with certain types of failure on behalf of the buyer or seller, (for example strictly construed, this would not embrace cases where the seller fails to make any delivery at all of a particular delivery) but the common law upon which this subsection is based, applies the same principles to severable contracts in other such that a more situations.

372. In the case of the Supply Contract, it is clear on its face that this is a contract where the parties intended that a single breach of delivery was to be treated as a repudiation of the entire contract. The Supply Contract was not, therefore, a contract which could be treated as a severable contract. It is to be regarded as an entire contract.

373. The Supply Contract made time of the essence in relation to Hitex's obligations to deliver on particular dates. However, time was not of the essence in relation to Uniserve's obligation to collect. If (as had already happened before 17 June) Uniserve failed to collect a delivery on time, this was a breach of contract, but not one giving rise to a right of termination. It could only give rise to a right of termination if Hitex served a notice giving Uniserve a reasonable time to meet its obligation to accept the goods and providing that Hitex would treat as a breach of the contract a failure to perform its obligation within that reasonable time.

374. This is entirely different to the case put forward on behalf of Hitex, that Uniserve needed to provide reasonable notice of an intention to collect deliveries that have become due but have not yet been collected.

375. I see that there might be an argument on fairness or estoppel grounds to state that Uniserve, having defaulted in its collection obligation would need to act reasonably in fixing a time for collection, if this is to be taken to mean a period of hours or days to arrange a convenient time for collection. I do not accept, however, that, if Hitex was affirming the Supply Contract, Hitex had a right not to meet its obligations under that agreement to have masks available by particular dates so that if it had not already manufactured the goods it would be given weeks or months to catch up with manufacture.

376. Mr Lewis and Mr Knight support their argument that Hitex continued at all times to meet its obligations under the Supply Contract with the proposition that Hitex could "recycle" or as they preferred to put it "retender" deliveries. If 3 million masks are due on one date and Uniserve does not collect them on that date, Hitex can proffer the same 3 million masks to meet a requirement to provide 3 million masks at a later date.
377. In support of this proposition, Mr Lewis and Mr Knight referred me to three cases.
378. The first was *Simpson v Crippin* (1872-73) L.R. 8 Q.B. 14. This related to a contract for the delivery of 6000 to 8000 tons of coal to be delivered into the plaintiffs' wagons at the defendants' collieries in equal monthly quantities over a period of 12 months. Immediately after the first month the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. This contract did not deal with the question of retender. It is better thought of as an early example of the court considering whether in a contract for the sale of goods to be delivered by instalments, failure to meet obligations in relation to one instalment amounted to a repudiatory breach which could be accepted by the other party to bring about the termination of the contract.
379. The second case referred to was *Barningham v Smith* (1874) 31 L.T. 540. This also dealt with a contract for the supply of coal, in this case to be supplied at an average rate of 20 wagons a day. The case turned on what the supplier needed to do to meet its contractual obligation to provide an average rate. The court decided that this matter was to be determined by an arbitrator. If this case has any relevance at all to our present circumstances, I think it relates to the approach the court took in assuming (I think correctly) that the measure of damages would need to be calculated by reference to the coal price at a particular date, and therefore it was necessary to work out the date on which the contract had been breached. It has no bearing on the question of retender.
380. The third case mentioned was *De Oleaga & Co v West Cumberland Iron & Steel Co.* (1879) 4 Q.B.D. 472. In this case there was a contract to supply "about 30,000 tons of Somoroastro ore" (which I take to be iron ore mined from Somoroastro near Bilboa in Spain) to be delivered at the rate of 800 to 1,300 tons per month, subject to certain conditions under what probably now would be referred to as a *force majeure* clause. (At a time where Classics held more sway, the relevant circumstances were referred to by the court, as "*vis major*".) Deliveries were interrupted by "*warlike operations*". The court held that the effect of these conditions was to entitle the seller to suspend deliveries and, when the "*warlike operations*" ceased to apply, the contract would remain binding on the parties for the amounts of ore remaining unsupplied. The supplier would be obliged to make up the quantities which had been withheld within a reasonable time.
381. This, therefore, was a case about the effect of *force majeure* under the terms of a particular contract. It is no authority for the proposition that if a purchaser fails to collect on a due date, this suspends the obligation of the supplier to meet its obligations to have the full amount of the supply it has contracted to deliver ready by the dates due under the contract if collection is sought later.
382. Mr Walsh put forward a very different case on behalf of Uniserve. He referred me to *Stocznia v Latco* [2002] 2 Lloyd's Reports 436, ("*Stocznia*") where a shipbuilder who contracted to provide build six hulls sought to claim an accrued stage payment in relation to 6 keels that have been laid, having laid only two of those keels, on the

argument that the purchaser having failed to take those keels, those keels could be re-rendered in respect of the stage payment due on the later contracts. Lord Lloyd of Berwick, in response to the question whether the keel-laying instalments on the third to sixth hulls would fall due thought that:

"My instinctive answer, and that which would, I think, be given by any fair-minded man, is "of course not," There only ever were two hulls. How can two hulls be made to serve the purpose of six contracts?"

383. He went on to justify this initial response by reference to the language of the contract in question.
384. This case turned on the wording of these particular contracts, and in any case, there are differences between shipbuilding and supplying finished goods.
385. With this jurisprudence in mind, I turn again to the construction of the Supply Contract. I see nothing in the Supply Contract that suggests that if Uniserve fails to collect a delivery on time, and then turns up later to collect that delivery and a subsequent delivery that is then due, Hitex can provide the subsequent delivery using the stock it had manufactured for the first delivery and should be given extra time to manufacture further stock to meet the second delivery.
386. In my view, if Hitex was seeking to continue to perform the Supply Contract after Uniserve's renunciation of the contract, it would have been required to continue accumulating stock to meet the cumulative totals outstanding according to the Revised Schedule. It is clear that after a period, Hitex did not continue to do this.
387. Against the background that Hitex neither expressly accepted Uniserve's abandonment of the contract as a repudiatory breach nor expressly affirmed the contract notwithstanding the breach, it is necessary to base an assessment of Hitex' response to the breach by what it did.
388. A party faced with a renunciation by the other party has a reasonable time to decide whether to accept renunciation or affirm the contract (see *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm) at [21] ("**White Rosebay Shipping**" and in particular there the quotation of Rix LJ in *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Reports 436 at [87] where he said:
- "In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed."
389. This case is good authority for the proposition that a party facing a repudiatory breach by the other party is not obliged to decide immediately whether to accept the breach as terminating the contract or to affirm the contract but will have a reasonable period in which to decide what to do. What is reasonable will, no doubt, depend on the circumstances.
390. I do not take the dictum quoted above, however, as authority that the default position must be that if nothing is said within the reasonable period, then affirmation, rather than acceptance of the repudiatory breach is the default position. I consider that that question

must be determined having regard to all the circumstances including the actions of the innocent party.

391. In our current case, the circumstances are these. By 17 or 18 June, Hitex had heard that Uniserve was treating the contract as being at an end. There was still some confusion, but certainly by 11 July, the reality that Uniserve was not considering itself bound by the contract must have been clear to Hitex.
392. According to the evidence of Mr Khader, which I believe, Hitex continued to produce as normal for a period. However, Hitex was not informing Majlan that further shipments were ready, Mr Khader says because it had understood that shipments were suspended.
393. At some point (Mr Khader cannot recall the day) the warehouses were totally full. The pressure was alleviated by sending Mr Popeck 2 million masks (which Mr Khader believes was before the end of July). This was done in repayment of loans (or perhaps advance payments) made by Mr Popeck to Hitex. According to Mr Popeck, the masks were treated between Hitex and Mr Popeck as having a value of \$300,000, but Mr Popeck was able to sell only some of the masks at a price of \$0.04 or \$0.05 per mask which was just enough to cover Mr Popeck's storage charges. Of the remaining masks he retained 5% for the use of himself, family and friends and gave the rest to charity.
394. According to Mr Khader, Hitex did not stop producing but reduced the rate of production, first decreasing the number of night shifts, then removing the night shifts altogether working for only 12 hours a day. Hitex made some sales in the local market. According to Mr Khader, Hitex could have met these sales as well as of the Supply Contract and could have increased production at any time. Efforts were also made to contact previous clients to sell masks there. Mr Khader's evidence was that towards the end of July Hitex made hundreds of calls to the people who were trying to communicate with Hitex between April and May.
395. Mr Popeck's evidence is that he did not have any further contact with Dr Stead after the telephone call on 17 June. After it became clear that Uniserve was not going to collect any more of the stock being produced he sought legal advice (which quite properly he has not disclosed as it was privileged). He says that his priority was to sell the stock as quickly as possible to get the money they were owed. He made efforts to try to find sales for the Hitex masks but according to him there was simply no market by that time. He was in contact with Mr Waller trying to find buyers for the masks via his network including to Amazon, TK Maxx, but according to him:
- "there was much more supply in the market and the deals had already been done, to buy over and above".
396. It is instructive to compare the cumulative numbers for mask supply to be supplied in accordance with the Revised Schedule with the numbers of masks shown to be available in the warehouse according to the Production Records. I have set these out in the table below.

<b>Date</b>	<b>In warehouse</b>	<b>Cumulative total to be delivered</b>
14 June	3,785,350	4m
21 June	5,656,550	7m
28 June	14,319,100	12m

Date	In warehouse	Cumulative total to be delivered
5 July	16,118,450	17m
12 July	18,413,650	24m
13 July	20,632,150	31m
20 July	20,198,300	39m
27 July	17,194,050	47m
3 August	17,194,050	55m
10 August	16,724,900	63m
17 August	14,476,350	71m
24 August	13,685,500	79m

397. To consider whether Hitex was supplying to the Revised Schedule, it is necessary to add the masks that did get to be shipped, which totalled 2 million masks (plus the first 1 million masks produced before the Revised Schedule was agreed).
398. It can be seen from the table that by 13 July Hitex was not maintaining sufficient masks to meet those due to be supplied under the Revised Schedule. From that time the number of masks available declined whilst the cumulative total required was inexorably rising.
399. The Production Reports also show no new masks being produced (or at least entered into the warehouse and into the accounting system) after 14 July except for 5,000 masks on 16 August.
400. I think it is clear from this evidence that Hitex was no longer performing to the Supply Contract by 13 July at the latest. In the absence of any express indication from Hitex whether or not it had accepted Uniserve's anticipatory breach, I consider that Hitex's conduct is consonant with an acceptance of Uniserve's breach, bringing the contract to an end. From this point (at least), Hitex was seeking to mitigate its loss rather than to perform the Supply Contract.
401. It is true that the greater part of the evidence referred to above as was internal to Hitex. Nevertheless, taking account of all the circumstances, I think it is highly material that there is no indication that Hitex took any steps to contact Majlan or Dr Stead, or anyone else representing Uniserve to arrange the pickup of masks. The last communications directed at Uniserve came from Mr Popeck, who threatened legal action. By 13 July, Hitex had made no attempt to arrange the pickup of 4 weekly deliveries that had become due.
402. I find, therefore, that the Supply Contract was terminated on or about 13 July through Hitex having by that date evinced through conduct its intention to accept the repudiation of the Supply Contract evident from the communications from Dr Stead and from Uniserve's ceasing to perform its obligations under the Supply Contract.
403. Before leaving the question of termination altogether, I should just mention, that there was some discussion of a *force majeure* letter that was produced by Mr Popeck at the suggestion of Dr Stead in telephone calls on 17 and 18 June, suggesting that this would protect both sides from a potential suit from the NHS. Mr Popeck produced such a letter backdated to 1 May.



404. It is doubtful whether Hitex would have been able under the Supply Contract to serve such a notice at this late stage, since the only events that the court has heard of that might give rise to *force majeure* related to the late delivery of the new automatic machines from China which occurred very early on in the course of the Supply Contract. Under clause 18 of the General Terms and Conditions in the Supply Contract, a claim for *force majeure* could relieve a party of a breach, but only if there is compliance with procedural requirements in that clause, including a requirement under clause 18.6 "*as soon as reasonably practicable*" to serve a written notice specifying the nature and extent of the circumstances giving rise to its failure to perform or any anticipated delay in performance of its obligations.
405. In any case it is not the pleaded case of any party that this *force majeure* letter had any contractual consequence, and no party was seeking to argue this. I will, therefore, ignore this point.

#### 14. MEASURE OF DAMAGES

406. Hitex's overarching case is a claim for loss and damage under section 50 of the Sale of Goods Act 1979 and at common law.
407. Section 50 provides as follows:

##### **"Damages for non-acceptance**

- (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."
408. In order to apply the *prima facie* test set out in subsection 50(3), it is necessary to ascertain whether there was "an available market for goods" at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, at the time of the refusal to accept.
409. The application of subsection 50(3) is ambiguous in the current case. It is possible to argue that the time was fixed for acceptance in the form of the Revised Schedule, and therefore the test should be to look for a market, on the dates in the Revised Schedule, for the numbers of masks to be accepted under the Revised Schedule on those dates. That is the analysis which Uniserve's expert witness, Ms Corbett assumed was relevant.
410. In my view, however, the better view is that in the current case one should look at the nature of the breach that gave rise to termination. Uniserve's renunciation of the contract created an anticipatory breach which brought the entirety of the contract at an

end from the point that this breach was accepted (which I have found to be 13 July). At that point Hitex lost the benefit of a secure contract to supply the remaining 77 million masks not already accepted by Uniserve. It is that loss of bargain that constitutes the loss "*directly and naturally resulting ... from the buyer's breach of contract*" (to use the language of subsection 50(2)). Hitex's loss (which at root is its loss of bargain) should be considered by reference to the market as at the date of that breach for a contract to purchase masks for forward delivery on the dates provided for in the Revised Schedule – i.e. the market for 77 million masks to be delivered on a schedule as similar as possible to the Revised Schedule.

411. I reach this view on the basis that I consider that subsection 50(2) is the overarching test of how damages should be calculated. In applying that test, one should look at the actual loss to the seller, which for Hitex is the loss of a bargain to sell the remaining 77 million masks at the price set out in the Supply Contract for delivery by the dates set out in the Supply Contract. As I have discussed above, the Supply Contract should be viewed as an entire contract. Accordingly, the loss occasioned by Uniserve's unjustified renunciation of the contract should be measured by reference to the entire contract. Subsection 50(3) exists to provide a useful clarification that where there is a market one should take the market or current price (rather than, for example, a price at which the seller actually chose to deal). It provides a *prima facie* rule of thumb for applying subsection 50(2). It is only a *prima facie* test and therefore clearly is not intended to overrule that subsection if its literal application would result in the seller receiving something different to the loss directly and naturally resulting from the buyer's breach.
412. However, Hitex was under an obligation to mitigate its loss. If there was no market for a single contract of 77 million masks delivered over the term of the Revised Schedule, but there was a market at or after each point at which a delivery was due under the Revised Schedule for the number of masks to be delivered on that date, (including the backlog that was due to have been taken by 13 July), the price that could have been achieved on those dates, would nevertheless be relevant in fixing Uniserve's liability.
413. The first questions, therefore, to be considered under section 50 are:
- i) was there a market in mid-July that Hitex could reasonably be expected to be able to access for a contract to acquire 77 million masks on or about the dates provided for in the Revised Schedule to be provided ex works from Jordan?
  - ii) was there a market after mid-July that Hitex could reasonably be expected to be able to access for contracts to supply on or after each of the dates provided for in the Revised Schedule (to be provided ex works from Jordan)?
  - iii) if in either case there was such a market, what was the contract price or current market price that might be achieved for this?
414. In order to assist with valuation, the Claimants and Uniserve each instructed an expert. Whilst both experts did their best to assist the court, there were major shortcomings in the expert evidence that each of them was able to produce.
415. The Claimants' expert was Mr Steve Trainor of consultancy firm Alvarez & Marsal. He had a long experience of working in the world of procurement including some procurement in the healthcare sector, but he had not been involved specifically in relation to the procurement of PPE generally or facemasks in particular and did not

have first-hand knowledge of the market for face masks during the relevant period which had been defined for him by his instructing solicitors as 31 April 2020 to 1 September 2020. His instructions had been to consider the wholesale price of Type IIR facemasks.

416. Accordingly, his report was for the most part based on materials that were publicly available, and for the most part was confined to materials concerning the UK public sector market (including the devolved authorities in Wales and Northern Ireland but, unaccountably, not Scotland).
417. His report provided:
- i) an overview of different types of medical grade facemask, outlining the production, manufacturing and certification requirements for such masks, and the supply of such masks prior to the Covid-19 pandemic;
  - ii) the impact of the pandemic on the supply and demand for PPE in the UK and globally during the relevant period and the effect that changes in supply and demand had on the price that could be achieved for masks during the relevant period; and
  - iii) his conclusions on the price that Hitex would have been able to achieve for Type II masks during the relevant period having regard to the impact of the pandemic.
418. He considered that the demand for PPE from March 2020 increased dramatically as NHS and care workers wanted to protect themselves from the virus. Initially, NHS staff working in clinical areas within 2 metres of a patient were required to wear a surgical facemask, but this requirement was extended to all staff working in a hospital from June 2020. He noted also, the disruption to global supply chains owing to the pandemic and the fact that some countries, including China imposed export restrictions in February 2020. This initially created shortages for PPE in the UK in the face of soaring demand.
419. By July 2020 the DHSC was able to announce that it had largely stopped from entering new contracts to source more PPE as it had "*more than enough stock*". It estimated that it held 3.9 billion more PPE items than it needed and was trying to dispose of excess stock through sales, donations to other parts of the public sector and recycling. By the end of September, the DHSC reported that it was "*on course to have stockpiled four months' supply of PPE by November 2020*". At that time, it had not received most of the PPE procured and was expecting two thirds of it to be delivered by the end of 2020. By 30 November 2020 the DHSC held 735% of the stock required for 120 days' use.
420. Perhaps one of the most useful attachments to Mr Trainor's report was an OECD report on global supply chains relating to vaccines and PPE. One of the "Key Insights" in this report was as follows:
- "Facemasks – trade helped mitigate temporary supply constraints.* In the space of three months in 2020, facemasks imports increased more than 15-fold both in value and volume in the United States, with similar surges observed in other major economies such as Canada, the European Union, and Japan. This surge in demand was largely met by greater imports from

the People's Republic of China (hereafter "China"). However, this was short lived; demand for imports of facemasks fell dramatically after the initial spike and sources of imports since diversified rapidly. In this instance, international trade and global supply chains enable countries to mitigate temporary supply constraints for essential goods in the face of surges of demand."

421. This point was illustrated by graphs showing imports of facemasks into Canada, the European Union, Japan, and the United States. In all cases, these showed a huge (for example 15-fold in the US) spike in imports occurring in March 2020 rising to a peak in June/early July and then very rapidly falling back in July and August. The report also showed the supply of facemasks becoming less concentrated at the later stages of the pandemic – that is there were many more suppliers.
422. Mr Trainor also considered it important to note that centralised healthcare procurement bodies would have required Hitex to go through local certification or validation and some bodies would require a distributor based in that authorities' jurisdiction. This would have created difficulties for Hitex in supplying to a centralised healthcare procurement body.
423. Mr Trainor considered that any time delay in obtaining approval would potentially have resulted in sales by Hitex ultimately being made in the context of a rapidly declining unit price for type IIR facemasks as an acceleration in supply caught up with demand.
424. Mr Trainor was frank in saying that he was unable to say definitively whether there was an available market for the masks, although he thought it to be highly unlikely. The testing and certification requirements, and in some cases requirements to partner with a locally authorised intermediary, and the practical difficulties of gaining access to procurement channels meant that it would have been difficult and time-consuming to sell the products in a country with a centralised document process. Whilst it may have been procedurally more straightforward to sell the masks piecemeal to multiple customers in different countries, this would also have been difficult, time-consuming, and costly as Hitex would have had to negotiate the different testing and accreditation requirements, pricing and delivery terms with each customer individually, and establish a distribution network for each country. If Hitex have been able to find alternative customers, these would have been sold at a considerably lower price than was agreed with Uniserve.
425. Mr Trainor noted also that the UK government operated a preference for suppliers based in the United Kingdom.
426. Whilst Mr Trainor noted that the demand for facemasks expanded beyond healthcare settings, with retail outlets procuring and selling facemasks to the general public, he gave very little attention to the retail market on the basis that his instructions were to consider only the potential for wholesale sales. In my view, he conflated two different categories: (i) the retail versus the governmental/institutional *market*; and (ii) retail versus wholesale *sales*. He did not consider in any detail whether there were wholesalers who were supplying the retail market, although he did note that Hitex would be at a competitive disadvantage in selling its medical grade masks to the retail market as it would be competing with cheaper alternative face coverings.

427. In cross-examination Mr Walsh and Mr Campbell were able to discredit some of the conclusions that Mr Trainor had reached based on a particular reading of some of the statistics in some of the UK materials.
428. In particular, Mr Trainor had developed a line graph based on public statistics of the unit price paid for Type IIR facemasks by Shared Services in Wales between April and October 2020. His graph seemed to show a steady and then increasing decline in prices from April 2022 October 2020, but was misleading as there were few data points and the X axis gave equal spacing to four transactions in April and ignored that there were no transactions in July August or September.
429. Whilst the presentation of this data was misleading, I think that the data points identified are material. There were:
- i) four transactions in April in which the price per mask declined fairly steadily from 73p to 40p;
  - ii) one transaction in May at which the price was 35p; and
  - iii) one in June at which the price was 24p.
  - iv) no transactions reported for July, August, or September; and
  - v) one transaction in October when the price was reduced to 6p. Ms Corbett notes this was a substantial transaction for 76 million masks, and as such shows that there was still a market for high volumes of facemasks at this point.
430. Mr Trainor also produced some evidence that the unit price of disposable medical masks in China have been on a downward trend, but the quality of this evidence was open to doubt.
431. Despite the limitations of the information that Mr Trainor was able to access, the materials Mr Trainor put together all do generally point to his overall conclusion that demand for masks worldwide was huge during February and March 2020 but very substantially declined by July 2020, whilst over that period supply had increased.
432. Uniserve's expert was Ms Deborah Corbett, who was the managing director of Core Medical Ltd which had been involved in securing PPE but only on a minor scale. She was also an independent consultant working for Valere Capital Partners LLP. She had further direct experience of procurement during the pandemic from her membership of the British Healthcare Trades Association, a trade association, which had assisted the UK NHS in obtaining PPE, although it was difficult to ascertain how involved she had been personally in these endeavours.
433. Ms Corbett began with a broad overview of how the market developed during the first six months or so of the pandemic in the UK.
434. She noted that there was huge demand for PPE such as facemasks, and a very limited supply available, in February and March. As a result, the price to buy facemasks was particularly high from February 2020 until about June 2020 owing to the stock available not meeting demand. She did not consider, however, that the market collapsed after June 2020. She noted that from 15 June 2020 became mandatory to wear face coverings in UK public spaces and this added to the demand for masks. I must be

cautious about this point, however, as Mr Trainor points out this was a demand for masks in general and not for Type IIR medical grade masks.

435. Ms Corbett, in support of the view that Hitex could easily approach the UK government to supply type IIR face masks, refers to the 2020/21 audit of NHS and National Services Scotland dated 29 November 2021. According to this report NHS NSS awarded 78 contracts worth £340 million to companies providing PPE between March 2020 and June 2021. Of these 29 were awarded with a total value of £98 million to new suppliers with no competition.
436. I do not find this persuasive as the figures apply to a period before the point when the contract terminated, and by July it is clear that the UK government had secured supplies and was able to end the loosening of its procurement regime which it had adopted as an emergency measure in the early days of the pandemic.
437. Ms Corbett goes on to describe how from late June onwards the market started to cool as more and more manufacturers were producing facemasks and delivery times were becoming shorter and the demand for facemasks began to plateau. The price per facemasks started to drop but, in her view, certainly did not collapse and there remained, in her view, a market for the sale and purchase of facemasks. She makes the point that the UK government had to discard billions of items of PPE that had turned out to be substandard. From late June to August 2020 the UK government began buying directly from manufacturers.
438. From June 2020 the market became further saturated when the government announced an agreement with the DHSC under which the NHS and public sector could order facemasks from the government with no cost to them. This meant that a portion of the customers to whom wholesalers supplied masks did not need to purchase them anymore, and that the government would supervise transaction prices.
439. It was her view that in any given month the price range for masks was relatively wide because the market was very volatile and lacked transparency during the period. There was no public register where all transactions were recorded and, accordingly, participants had little visibility regarding the fair price for masks at any given point. Nevertheless, she felt able to opine that a market existed into which Hitex could have sold facemasks during the relevant period. She felt able to provide a view about what price Hitex could have achieved had it sold into the market being:
- i) around 11p per mask for the deliveries due under the Revised Schedule in May 2020
  - ii) around 45p per mask for deliveries due in June 2020
  - iii) around 11p for deliveries in July 2020; and
  - iv) around 11p for deliveries in August 2020.
440. These prices were based on the lowest prices for transactions of which she was aware.
441. In each case the estimated price was for selling those deliveries in a single batch. She considered that higher prices might have achieved if the facemasks had been sold in smaller batches.

442. The evidence on which she relied for these conclusions, in addition to her own impressions, having been involved in procurement of PPE at this time, was principally as follows:
- i) Transactions that had been concluded by her company Core Medical with suppliers and resellers. On her evidence "*the bulk of these transactions*" rather than all these transactions involved Type IIR masks. Ignoring transactions that had been cancelled, these transactions generally were numbered in tens of thousands of masks, and I consider cannot be taken as evidence of a market for 77 million masks delivered over time, or even for the ability to sell the weekly consignments (which by July amounted to several millions each week).
  - ii) A table of transactions entered into by the parties to this litigation with which Ms Corbett had been supplied by Uniserve's solicitors. These comprised only five transactions, one of which was the transaction under the Supply Contract, and another was the purchase by Uniserve from BYD of 60 million masks, which as we have seen, was negotiated prior to July. The only transaction taking place after mid June was a transaction on 23 July where 2 million masks were purchased for 13p. No further transactions were entered into after that date.
443. Perhaps the best evidence offered by Ms Corbett to demonstrate that there was still a market, was that Paragon Health Limavady, a manufacturer that was based in Northern Ireland, obtained in November 2020 an order with a value of £50 million to supply Type IIR facemasks. The price per mask was not disclosed. The press release dated 16 November dealing with that order also stated that there were a number of other local firms nearing completion of the assessment process and, if successful, they too will begin production of Type IIR masks in the coming weeks. The expected orders were said to be in excess of £49 million over 12 months. The price per mask again was not disclosed.
444. Of course, as well as evidencing that sales to government were still possible in November 2020, this press release may be taken as substantiating a point made by Mr Trainor as to the UK government's preference towards UK suppliers.
445. Ms Corbett did not address herself to the difficulties noted by Mr Trainor faced by Hitex in supplying government agencies particularly in the UK or the time that would be taken to obtain any necessary accreditations required by any public sector purchaser. Neither expert addressed the question whether the fact that Hitex had been accepted as a manufacturer for the purposes of the contract between Uniserve and DHSC would assist it in obtaining a contract with another wholesale purchaser who was looking to sell to the DHSC, or indeed as to the number of wholesalers that were being dealt with.
446. The expert evidence on both sides was of limited use to the court. Neither expert had much to offer in relation to markets outside the United Kingdom. Mr Trainor dismissed the possibility of sales other than to government purchasers, whilst a retail market clearly did exist for masks and there must have been wholesalers supplying that market that Hitex might have been able to deal with, even if this meant pricing the masks at a price that would be competitive with non-medical grade masks. Ms Corbett did not address the issues of accreditation and preference for local suppliers that a Jordanian company might encounter in supplying into another country. Neither was the evidence that she adduced on price particularly relevant to the volumes of masks that Hitex needed to sell.

447. I am obliged, however, to make a determination notwithstanding the less than satisfactory evidence that is presented to me. Whilst by the end of July I consider that the public sector demand for masks had been substantially sated I consider that it would have been possible for Hitex to sell masks during that period had it accessed appropriately connected wholesalers. It would have been possible to sell to wholesalers accessing retail markets, albeit at a price that would need to be competitive with non-medical grade masks. There was probably also still an ability to sell to public sector buyers across the world, but only after meeting accreditation requirements, which would have delayed the sales and would have caused them to be made during a period when supply was greatly outstripping demand.
448. As to the price that could have been achieved, the only evidence offered is:
- i) the price that the Welsh government was prepared to pay for masks, being 20p per mask in June 2020 and 5p per mask in October 2020 - these prices, it may be noted were the prices paid by the end customer. Hitex in my view, could not have dealt directly with the Welsh government and would have needed to deal through a wholesaler who would have taken its own profit out of these figures;
  - ii) the evidence from Ms Corbett that her company (which I would regard as a wholesaler) made a single purchase of 80,000 masks at 11p on 9 July 2020. Her company made various sales during July and August, but these cannot be regarded as providing a reliable price as they were in trivial amounts and the purchasers are redacted and I cannot assume that they were wholesale purchasers.
  - iii) the evidence that BYD was prepared to sell 60 million masks at 28p in June 2020;
  - iv) that a party made a transaction of 2 million masks on 23 July 2020 at 13p per mask - we do not know whether this was a sale or purchase. It is likely that this was a reference to the transfer of masks to Mr Popeck. If so, this cannot be regarded as an arms'-length transaction reflective of prices at that date.
  - v) that the cost of production per mask as assessed by Dr Stead, and not rebutted, was somewhere between US\$ 0.03 to and US\$ 0.04 per mask and it may be presumed that competitors would not continue to produce masks at a loss.
449. Having found that there was a market, I am obliged to make a determination as to what the "market or current" price.
450. I have been provided very little information that is both relevant and reliable as to the wholesale prices for masks in the millions during the period after the termination of the Supply Contract that Hitex might reasonably be expected to have achieved. What indications I have suggest to me that by the point that the contract was over, and Hitex could be expected to turn its attention to mitigating its loss, it could have achieved only a modest profit over the cost of production. For the purposes of calculating damages, I will set this figure at US\$ 0.08 per mask.
451. The compensation payable to Hitex by Uniserve, therefore, should be based on the contract price of US\$ 0.30 less US\$ 0.08 per mask multiplied by 77 million masks. This comes to some US\$ 16,940,000. To this there should be added interest. I will hear representations from the parties as to the appropriate basis for this.



## 15. UNISERVE'S COUNTERCLAIM

452. I have already dismissed Uniserve's counterclaim based on misrepresentation.
453. Uniserve also has a counterclaim based on the fact that it made payment of an invoice for US\$300,000 which, as was found by Deputy Judge Joanne Wicks to have been validly assigned to Caramel. There has been no real defence from Hitex to this claim beyond a bare denial in pleadings and I consider that it must succeed.
454. It seems to me that there are two possible solutions to this. The first is that I find that Hitex received this amount on trust for Caramel and should now, if it has not already done so, account to Caramel for the amount. The second possible solution is that I allow Uniserve to set off this amount against the compensation owing to Hitex that I have found above, and Uniserve should make an immediate payment of this amount to Caramel. I will make one order or the other after I have received further representations from the parties.

## 16. CAMEL'S CLAIM

455. Caramel and Mr Popeck claim that they are owed £19,250,000 or damages plus interest in relation to Uniserve's breach of the Commission Contract. Uniserve denies that it is in breach.
456. The Commission Contract provided for Caramel/Mr Popeck (defined together in the Commission Contract as the "Introducer") to be paid a commission in respect of their introduction of Hitex to Uniserve. According to clause 3.1 of the Commission Contract, this commission is to be calculated in relation to each "Shipment" (defined by a shipping schedule set out in the Commission Contract, matching the original delivery schedule in the Supply Agreement).
457. Under clause 4.1 of the Commission Contract, Uniserve is obliged to produce a fee schedule on the date that each Shipment arrives in the United Kingdom and is cleared by the United Kingdom customs authority. On receipt of a Fee Schedule the Introducer is entitled to raise an invoice setting out the amount of commission payable in accordance with the applicable fee schedule plus VAT. Uniserve is then obliged to pay such invoice within two days of receipt to the bank account of Caramel.
458. Clause 5.1 sets out various circumstances in which a refund of a payment of commission may be due. These include circumstances where Hitex is under an obligation to refund amounts paid under the Supply Contract "*or Uniserve has the right to set off, or is otherwise not obliged to pay, any amounts due to the Supplier pursuant to the Supply Agreement*". The Introducer acknowledges that it shall not be entitled to any Commission in respect of such goods and undertakes to refund any commission that it has received by reference to such supply of goods.
2. Clause 6.1 sets out an acknowledgement that the Commission Contract does not represent a commitment by Uniserve to purchase any Goods from Hitex.
459. Clause 8.1 holds that the Commission Contract will terminate automatically on the date that the Supply Contract terminates "*for whatever reason*". This does not, however, affect any rights and remedies that have accrued as at termination, including the right to

claim damages in respect of any breach of the agreement which existed at or before the date of termination.

460. Under the plain terms of the Commission Contract, commissions are due only after a shipment arrives in the United Kingdom and has cleared customs. Uniserve argues, on this basis, that it is not obliged to make any further payments beyond the commission due in respect of the 3 million masks which were shipped to the UK, since only these masks were shipped.
461. It is argued, however, on behalf of Caramel/Mr Popeck that implied terms must be introduced into the agreement on the basis that it was always the intention of the parties that Uniserve would accept the goods tendered by Hitex (provided they met the relevant specification) and would arrange for them to be shipped to the United Kingdom. To give business efficacy to the Commission Contract it is necessary to imply a term that Uniserve agrees to procure this (or at the very least use reasonable endeavours to procure this).
462. I disagree. I would go as far as saying that it is necessary to imply a term that Uniserve could not accept the masks and arrange for them to be collected in Jordan but then diverted to a buyer outside the United Kingdom in order to avoid making a payment under the Commission Contract. I would not however go so far as to say that it is necessary to imply a term that Uniserve will take all the masks contracted for under the Supply Contract or that it will not breach the Supply Contract.
463. In my view, the aims of the Commission Contract are clear on its face: it is for Uniserve to pay a commission for masks that are actually delivered to it and which are of the proper quality.
464. One of the arguments deployed on behalf of Caramel/Mr Popeck is that the Supply Contract and the Commission Contract were two aspects of a single contract – Mr Popeck's original plan was to buy from Hitex and sell to Uniserve at a profit and the Commission Contract was intended to have the same effect.
465. I do not accept this argument. Whilst there are circumstances where it is legitimate to consider the "contractual matrix", the background and circumstances leading to the contract, I do not think that these circumstances apply here.
466. The Commission Contract includes an entire agreement clause at clause 10.5 so that the agreement:
- "supersedes and replaces all prior communications, agreements of whatsoever nature, whether oral or written".
467. At clause 10.6 there is an acknowledgement by each party that it is not entering into the agreement in reliance on any representation, warranty or other undertaking or understanding" not fully reflected in the terms of the Commission Contract.
468. In view of these provisions, I consider that I should interpret the Commission Contract according to its own terms and it seems clear to me that those terms provide for commission to be paid only on masks that were delivered to the United Kingdom. The contract is clear at clause 6.1 that the Commission Contract itself does not create an obligation to buy any masks and the provisions for payment only once masks have cleared customs reinforce this point. It is clear that Uniserve was only willing to make a

payment of commission if it received the masks in the United Kingdom so that it could supply them to its purchaser and make profit. The position is analogous to that of an estate agent who agrees to accept a commission from the seller on completion of the sale. One would not imply into such an agreement a condition that the seller, having agreed a sale, must pay the commission even if the sale does not proceed to completion.

469. Furthermore, Uniserve argues that the Commission Contract automatically terminated on termination of the Supply Contract.
470. Whilst I have rejected Uniserve's argument that the Supply Contract was terminated by Uniserve's acceptance of a repudiatory breach by Hitex, I have found that Hitex must be regarded as treating the Supply Contract at an end by the middle of July as a result of its acceptance by conduct of Uniserve's anticipatory breach. The contract was terminated by this date, therefore, and Uniserve's argument can therefore still apply.
471. Termination did not (under clause 8.1) affect any party's rights and remedies that had accrued as at termination. However, the only material right that had accrued to the Introducer at termination was the right for a commission on goods that had been accepted prior to that date. My understanding (which can be corrected, if necessary, at a consequential hearing) is that the Introducer has been paid up to date for all such deliveries.
472. In my view no term can be implied into the agreement that Uniserve agreed not to terminate the Supply Contract. Clause 8.2 is clear that termination of the Commission Contract applies where the Supply Contract is terminated "*for whatever reason*".
473. I must, therefore, find against the claim on behalf of Caramel and Mr Popeck for commission (except insofar as there may be any commission outstanding on masks that were accepted by Uniserve prior to the termination of the Supply Contract).

## **17. THE CLAIMS AGAINST MAXITRAC AND DR STEAD**

474. Uniserve makes essentially two complaints against Maxitrac and Dr Stead.
475. The first is that Maxitrac and/or Dr Stead were in breach of duties to Uniserve in agreeing the Revised Schedule. This is included on the basis that Uniserve did not confer any authority to amend the terms of the Supply Contract so that any consequent liability that Uniserve may have to Hitex for breach of the Supply Contract was caused by Maxitrac/Dr Stead exceeding its/his authority.
476. The short answer to this claim is that I have found that Dr Stead was given express authority by Mr Liddell to sort out the Supply Contract. He understood this to encompass authority to agree the Revised Schedule. I consider he was reasonable in interpreting his instructions this way. Accordingly, he/Maxitrac were not acting outside their authority.
477. Furthermore, even if they were acting outside their authority, the Revised Schedule was quickly brought to the attention of Uniserve. Mr Bonnett, Mr Chaplin, and Mr Liddell were all aware of it. If they had not intended to agree it, they could have immediately drawn Dr Stead's attention, and indeed the attention of Hitex, to the point that this was not agreed and/or was agreed but without waiver of any rights for breach of the original schedule. They failed to do this and thereby allowed Hitex to operate on the basis that

Uniserve would accept performance according to the Revised Schedule knowing that Hitex would rely on this representation. This had the effect of either ratifying Dr Stead's agreement of the Revised Schedule, or at the very least of creating an estoppel, effectively preventing them from denying the agreement of the Revised Schedule later.

478. It follows, that if there had been any breach by Maxitrac in exceeding its authority as some kind of agent, Uniserve could very easily have entirely mitigated the effect of that breach by speaking up when Uniserve became aware of it.
479. In my view, Uniserve accepted that agreement to the Revised Schedule was making the best of the circumstances that Uniserve found itself in, having committed to supply masks to DHSC and at that point having no other supplier. Dr Stead was doing what he was asked to do, Uniserve raised no objection to this at the time and has no case that it has suffered loss through Maxitrac or Dr Stead acting contrary to its wishes. If Uniserve had wanted a different outcome it would have said so at the time.
480. Uniserve's second complaint against Maxitrac and Dr Stead is that they failed, as instructed, to terminate the Supply Contract when ordered to do so.
481. There are several reasons why a claim based on this complaint cannot succeed.
482. The first, and most fundamental, is that I have found that at the time that Uniserve states that it had instructed Maxitrac/Dr Stead terminate the Supply Contract Uniserve had no right to terminate the agreement as it had not established a breach of the Revised Schedule.
483. The second reason is that Uniserve has not been able to demonstrate that there was a clear instruction for Dr Stead to claim a breach. The only instructions pointed to were telephone calls that were at best ambiguous. In the context that the Supply Contract contained a specific means of terminating the contract which was for Uniserve, rather than any agent of Uniserve to undertake, and against the further background that when termination had been discussed earlier Dr Stead had drafted a notice for Uniserve to send, it is difficult to believe that the ambiguous telephone call where Mr Liddell said that "it's over" and indicated that he had terminated the agreement should be construed by Dr Stead as an instruction for Maxitrac to do so.
484. Furthermore, if the complaint is that Dr Stead failed to pass on the information that Uniserve was treating the contract as at an end through Hitex's breach, in my view there is nothing in that complaint, since that is precisely what Dr Stead did. If Hitex had been in breach at this point, then Dr Stead's communications to Mr Khader and Mr Popeck would have been effective to convey the point that Uniserve was treating the contract at an end as a result of Hitex' breach. Uniserve's loss does not derive from his (or Maxitrac acting through him) failing to convey this. It arises from the fact that Uniserve had jumped the gun and was treating the contract as over without first having established any reasonable cause to believe that Hitex was in breach.
485. For all these reasons the claims against Maxitrac and Dr Stead must fail.

## **18. CONCLUSION**

486. Uniserve's defence against Hitex's claim for payment for masks which it was obliged to accept fails. Hitex is entitled to damages.

487. Doing my best with the limited information available from the expert witnesses, I have found that there was a market in which the masks that Uniserve failed to take could have been sold and I have made the best assessment I can of the price at which this could have taken place. Hitex is entitled to damages on this basis.
488. I have not, however, found for Caramel or Mr Popeck on the basis that the Commission Contract has not been breached in accordance with its terms, and that it is going too far to imply into that agreement the terms that they seek to imply.
489. Uniserve's case against Maxitrac and Dr Stead must also fail. Dr Stead was acting on specific instructions in agreeing the Revised Schedule, and even if he was not, Uniserve could easily have corrected this at the time. The truth was that they accepted the Revised Schedule as the best solution available. As regards the allegation that Maxitrac/Dr Stead failed to communicate the termination of the Supply Contract, the fact that Dr Stead's communications failed to bring about a termination for breach on the part of Hitex had nothing to do with Dr Stead's failure to communicate to Hitex that Uniserve was treating the Supply Contract as being at an end, and everything to do with the fact that Uniserve had failed to demonstrate a breach.
490. Given that Maxitrac and Dr Stead have been living under the terms of a worldwide freezing order for some considerable time, a consequential hearing should be arranged at the first available opportunity to deal with all matters arising out of this judgment.